W&T OFFSHORE, INC.

IBLA 98-179 Decided May 11, 1999

Appeal from a decision of the Associate Director for Policy and Management Improvement, Minerals Management Service, rejecting a consolidated appeal from three MMS orders directing payment of $183,600 in civil penalties for knowing and willful violations of regulations mandating the installation of critical safety devices on offshore production facilities. MMS-0103-PEN (GOM 95-06), MMS-0104-PEN (GOM 95-07), and MMS-105-PEN (GOM 95-08).

Appeal reviewed de novo, Reviewing Officer's decisions in GOM 95-06 and 95-07 affirmed as modified; Reviewing Officer's decision in GOM 95-08 reversed.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

   Section 22(b) of the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. § 1348(b) (1994), mandates that any holder of a lease or permit on the outer continental shelf is under a duty to maintain all operations within such lease area or within the area covered by such permit in compliance with regulations intended to protect persons, property, and the environment on the outer continental shelf. Section 22(c) requires scheduled on-site inspection of all safety equipment designed to prevent or ameliorate blowouts, fires, spillage, or other major accidents at each facility on the outer continental shelf at least once a year. Civil and criminal penalties may be assessed for violation of any term of a lease, violation of a safety regulation, or falsification of required records.

2. Administrative Procedure: Hearings--Constitutional Law: Due Process--Rules of Practice: Appeals: Effect of--Rules of Practice: Hearings

   Due process does not require notice and a prior right to be heard in all cases in which there is alleged impairment of property rights so long as an opportunity to be heard is provided before the alleged impairment

becomes final. An MMS Reviewing Officer's investigation and establishment of a civil penalty is not an APA hearing subject to due process standards. An appeal to the Board of Land Appeals, with its plenary authority to conduct a de novo review, will satisfy due process requirements.

3. Administrative Authority: Laches--Estoppel--Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by the acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

4. Administrative Authority: Estoppel--Board of Land Appeals--Estoppel

The four elements of estoppel are (1) the party to be estopped must know the facts; (2) that party must intend that its conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other party's conduct to its injury. In addition, estoppel against the Government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts, and oral statements are insufficient to support a claim of estoppel because the statement relied upon must be in the form of a crucial misstatement in an official decision.

5. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties

When assessing a civil penalty under 43 U.S.C. § 1350(b) (1994) and 30 C.F.R. § 250.200(a)(1) (1997) for failure to follow the mandates set out in 30 C.F.R. Part 250 (1997), MMS is the proponent of a rule or order with the burden of proving its allegations with reliable, probative, and substantial evidence. Penalties in civil actions should not be imposed except in cases that are clear and free from doubt, and questions in doubt must be resolved in favor of the party from whom the penalty is sought.

6. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

When deciding the dollar amount of a civil penalty, the MMS official should consider factors that contribute to a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment. Good judgment and detailed documentation are required, and an explanation of the factors used as the basis for determining that amount and the weight given to those factors should be stated.

APPEARANCES: Robert M. Habins, Jr., Esq., and John C. McNeese, Esq., New Orleans, Louisiana, for appellant W&T Offshore, Inc.; Frank A. Conforti, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

W&T Offshore, Inc. (W&T Offshore) has appealed a November 7, 1997, decision issued by the Associate Director, Policy and Management Improvement, Minerals Management Service (MMS), rejecting W&T Offshore's appeals from three MMS orders, dated February 9, 1996 (GOM 95-07), and February 14, 1996 (GOM 95-06 and GOM 95-08), assessing civil penalties against W&T Offshore totaling $183,600. On appeal to MMS, the cases were docketed as MMS-0103-PEN (GOM 95-06), MMS-0104-PEN (GOM 95-07), and MMS-105-PEN (GOM 95-07). This Board has consolidated the appeals and assigned the appeal docket number IBLA 98-179.

By way of introduction, the basic question in this case is whether W&T Offshore had installed sub-surface safety devices (SSSD's) in some of the wells it operated from offshore oil/gas well platforms in the Gulf of Mexico, within the time frame set by MMS regulations. Some of the wells were on "satellite" facilities, not located at a platform, and one was located at a manned platform. These SSSD's are designed to shut off the flow of oil and/or gas in the event that the integrity of the production system is compromised. After studying W&T Offshore's records and making physical inspections of the W&T Offshore wells, MMS issued three notices that it intended to levy civil penalties because W&T Offshore had failed to install the SSSD's. It was not known at the time of the alleged violations that the wells were no longer capable of producing oil or gas under pressure or that the wells were no longer capable of positive flow, but all had a positive flow of gas prior to W&T Offshore's acquisition of the leases. Following issuance of notices of the intent to levy a civil penalty, a hearing was held, an appeal to MMS was taken, and following MMS' final decision, an appeal was taken to this Board.

The alleged violations stem from W&T Offshore's operations on Lease OCS-G 1117, South Marsh Island Block 6, and Lease OCS-G 1182, South Marsh Island Block 11. W&T Offshore acquired Lease OCS-G 1117 from Exxon Corporation and a 50-percent interest in Lease OCS-G 1182 from Texaco in March 1989. Shortly thereafter, the MMS Lafayette District Office notified W&T Offshore that it intended to inspect the platforms located on the leases. According to MMS, advance notice was given because Exxon left the platform in disrepair, and 1 month was deemed sufficient to make the necessary repairs. In May 1989, an inspection was conducted and 36 Incidents of Noncompliance (INC's) were found. These incidents were for apparent violations of 30 C.F.R. §§ 250.121 and 250.124 (1996) by reason of (1) removing SSSD's at three wells; (2) failure to test SSSD's in five wells; and (3) either disabling or failing to properly test or maintain at least 12 additional safety devices. On June 15, 1989, the District Supervisor wrote to W&T Offshore advising it of the observed failure to comply with MMS regulations, and informing it that any further violations could result in imposition of penalties. On June 21, W&T Offshore protested, stating that the company practices were improperly characterized.

Between December 1990 and January 1991, MMS conducted further inspections and found 46 additional INC's. Eight of those INC's involved failure to install, maintain, or inspect SSSD's. As a result, the Inspector General (IG), Department of the Interior, initiated an investigation focusing on whether to assess civil and/or criminal penalties. This investigation identified 50 occasions between April 3, 1989, and January 5, 1991, when it appeared that SSSD's had been removed from wells in violation of MMS regulations.

On July 1, 1992, W&T Offshore sold its interest in the wells and ceased being the operator. The IG continued its investigation. However, in January 1995, the Assistant U.S. Attorney declined to pursue criminal prosecution because the statute of limitations for criminal prosecution had run. Therefore, the MMS Civil/Criminal Penalty Program, the Solicitor's Office, and the IG jointly explored the possibility of assessing civil penalties for violations of the MMS regulations for which the statute of limitations had not run.

On August 1, 1995, an MMS Reviewing Officer was assigned to Civil Penalty Cases GOM 95-06 and GOM 95-07. The memorandum assigning GOM 95-06 alleged that, based upon records obtained from the IG, the SSSD's had been removed. The memorandum assigning GOM 95-07 stated that, based upon records obtained from the IG, the SSSD had been removed and the pump-through plugs were not installed in the tubing for well 34, South Marsh Island Block 11, (located on a satellite structure) and the well was left unattended. On August 7, 1995, a Notice of Proposed Civil Penalty was issued for GOM 95-06 ($45,000) and GOM 95-07 ($81,600).

On August 15, 1995, the same Reviewing Officer was assigned to Civil Penalty Case GOM 95-08. MMS reported that these incidents involved violation of 30 C.F.R § 250.121(h)(1) (1996), which states in part, "Each wireline- or pumpdown retrievable subsurface safety device may be removed

* * * for a period not to exceed 15 days," and 30 C.F.R. § 250.20(a) (1996), which states, "The lessee shall perform all operations in a safe and workmanlike manner and shall maintain all equipment in a safe condition for the protection of the lease and associated facilities, the health and safety of all persons, and the preservation and conservation of property and the environment." The memorandum assigning GOM 95-08 stated that, based upon records obtained from the IG, the SSSD for Well A-21D, South Marsh Island Block 6, which is on a manned platform, was removed for routine operations and was not reinstalled in the tubing within the 15-day grace period, and that no approval for an extension of the grace period had been given by the District Supervisor. The memorandum further alleged that W&T Offshore had conducted unsafe and unworkmanlike operations on Well A-21D when it removed the SSSD for a prolonged period of time during which no operations were conducted on the well and no wireline personnel and equipment were available on the site to reinstall the SSSD equipment if needed. A Notice of Proposed Civil Penalty in the amount of $57,000 was issued on September 19, 1995, for GOM 95-08.

The Hearing Officer held a hearing in the MMS Regional Office, New Orleans, Louisiana, on December 12, 1995.

A final Reviewing Officer's decision letter was issued for Civil Penalty Case GOM 95-07 on February 9, 1996. In her decision, the Reviewing Officer found that, although W&T Offshore had not operated the property since 1992, it did have full access to the files and records. She then stated that:

> After review of the hearing testimony, wireline tickets, daily production reports, and MMS regulations the following conclusions were drawn:
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> 1. A no-flow test had never been performed on Well No. 34, so therefore it would be speculative to say the well was incapable of natural flow. A small amount of tubing pressure existed in the well. Had an accident occurred, such as the wellhead being damaged, the well could have flowed naturally. A wireline ticket dated August 28, 1990, noted the well flowed for 20 minutes.
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> 2. No paperwork could be provided (such as helicopter logs or captain's log for marine vessels) to show there had been someone in attendance at the satellite well. Review of wireline tickets reveals there was wireline work performed between the pulling and reinstallation of the SSSD, however, the crew either rigged up and rigged down every day or the crew secured the rig each night. For none of the well's violation periods were there more than 12 hours per day noted under the work hours (except on September 20 and 25, 1990, where there were 13 hours) on any wireline tickets.

> 3. While it is true that an SSSD may be removed while performing routine operations, 30 C.F.R. § 250.121(h)(3) clearly states, in part, "...If the well is on a satellite structure, it must be attended or a pump-through plug installed...". Performing work under a Sundry Notice does not preclude the operator from being responsible for the above-stated regulation.

(Feb. 9, 1996, Reviewing Officer's Decision at 3-4.) The Reviewing Officer also observed: 1/

> The SSSD is installed below the mud line as a final safety device capable of shutting in a well in the event of the failure of wellhead equipment. Fires, explosions, major storms, and ship collisions are examples of events that could cause the failure of wellhead equipment. Removing the SSSD from a well and leaving that well unattended eliminates this final safety device from being activated. This is a violation applicable to the provisions of 43 U.S.C. § 1350(b) (1994) and 30 C.F.R. § 250.200(a)(1). This constituted a threat of serious, irreparable, and immediate harm to life (including fish and other aquatic life), property, and the marine, coastal and human environment.

Id. at 4. The Reviewing Officer concluded with her finding that

> [b]ased on a complete review of the evidence * * *, I find that W&T [Offshore] did violate 30 C.F.R. § 250.121(h)(3) for well No. 34, South Marsh Island Block 11. In consideration of all circumstances of the violation a penalty of $81,600 is hereby assessed against W&T [Offshore]. This penalty amount is based on $1,200 per day with the violation period being August 20 through October 26, 1990.

Id. at 4.

On February 14, 1996, final Reviewing Officer decision letters were issued for Civil Penalty Cases GOM 95-06 and GOM 95-08. After stating general conclusions in response to general arguments advanced by W&T Offshore, in her decision regarding GOM 95-06, the Reviewing Officer found:

1/ This observation also appeared in her decisions in GOM 95-07 and GOM 95-08, with the following additional language appearing in GOM 95-08: "Also, not conducting routine operations on the well for prolonged periods of time after the SSSD has been removed and not having wireline personnel on site to reinstall an SSSD if needed represent unsafe and unworkmanlike operation."

After review of the hearing testimony, wireline tickets, daily production reports, and MMS regulations the following conclusions were drawn:

> 1. A no-flow test had never been performed on any of the 4 wells, so therefore it would be speculative to say the wells were incapable of natural flow. Tubing pressure existed in all of the wells except Well No. 29. Had an accident occurred, such as a wellhead being damaged, wells could have flowed naturally. W&T [Offshore]'s own testimony reveals that the wireline work was being performed to determine whether the wells could flow, and it was not until subsequent operations that W&T [Offshore] determined the wells would not flow.
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> 2. No paperwork could be provided (such as helicopter logs or captain's log for marine vessels) to show there had been someone in attendance at the satellite wells. Review of wireline tickets reveals the following: 1) for Wells Nos. B-13D and 26 there were no wireline tickets between the time the SSSD was pulled and reinstalled; they had to travel to the subject wells and rig up before reinstalling the SSSD; 2) for Well No. B-6 there was wireline work performed between the pulling and reinstallation of the SSSD, however, the crew rigged up and rigged down every day; 3) for Well No. 29 wireline work was performed between the pulling and reinstallation of the SSSD, crew secured the rig each night. For none of the well's violation periods were there more than 12 hours per day noted under the work hours on any wireline tickets.
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> 3. While it is true that an SSSD may be removed while performing routine operations, 30 C.F.R. § 250.121(h)(3) clearly states, in part, "...If the well is on a satellite structure, it must be attended or a pump-through plug installed..." Performing work under a Sundry Notice does not preclude the operator from being responsible for the above-stated regulation.

(Feb. 14, 1996, Reviewing Officer's Decision re GOM 95-06 at 3-4.) The Reviewing Officer concluded with her finding that:

> Based upon a complete review of the evidence in this case, including all matters disclosed at the December 12, 1995, hearing, I find that W&T [Offshore] did violate 30 C.F.R. § 250.121(h)(3) for Well B-13D, South Marsh Island Block 6; and

Wells Nos. 26 and 29, and B-6, South Marsh Island Block 11. In consideration of all circumstances of the violations a penalty of $41,400 [sic $41,100] is hereby assessed against W&T [Offshore]. This penalty amount is based on $1,500 per day per well with the following violation periods:

Well B-13D August 18 - 21, 1990 (4 days)
Well 26 January 1 - 6, 1991 (6 days)
Well B-6 October 27, 1990 - November 2, 1990 (7 days)

Well 29 was assessed $1,200 per day with the violation period of October 11 - 23, 1990 (13 days). The proposed penalty for this well was mitigated due to there being less of a threat of this well flowing had the wellhead equipment been damaged. No tubing pressure was recorded for the violation period and the Sundry Notice stated there was wireline fish in the hole.

Id. at 4.

She made a similar finding for GOM 95-08:

After review of the hearing testimony, wireline tickets, daily production reports, and MMS regulations the following conclusions were drawn:

1. A no-flow test had never been performed on Well A-21D, so therefore it would be speculative to say the well was incapable of natural flow. Tubing pressure did exist in the well. Had an accident occurred, such as the wellhead being damaged, the well could have flowed naturally.

2. No records exist to support the claim that W&T [Offshore] received a verbal approval when their routine operations extended beyond the 15 day period allowed. Even though W&T [Offshore] could not find these records (due to transfer of records to a new operator, the Lafayette District office would have kept records on these verbal approvals, and none were found. Therefore, it is concluded nonverbal approval was never granted.

3. In the initial case file, no paper work could be provided to show there were any wireline personnel at the South Marsh Island Block 6, A platform from October 23 through December 5, 1990. At the hearing, W&T Offshore provided production reports that support a wireline crew being on the SMI 11 A from October 21 through November 4, 1990. This crew would probably be able to respond to problems identified by W&T

> [Offshore] personnel on the South Marsh Island Block 6A platform in a reasonable amount of time. However, from November 5 through December 5, 1990, no SSSD was in the well, no routine Operations were being conducted on the well, no wireline personnel and possibly equipment were available to reinstall an SSSD on the South Marsh Island Block 6A platform if needed.
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> 4. W&T [Offshore] maintains that since an SSSD was pulled on December 11, 1990, and no wireline ticket recorded when that SSSD was reinstalled, the assumption must be made that the valve was in place on October 22, 1990 (the last time wireline work was performed on the well). While this does seem like a logical deduction, the case file contains more information on this subject.
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> An interview, by the Inspector General, with the wireline operator who pulled the SSSD on December 11, 1990, revealed the wireline operator was instructed (by a W&T [Offshore] employee) to drop the SSSD in the well. He refused to do so, and W&T [Offshore] had someone else drop the SSSD in the well. He did not have his tally book in hand at the time of the interview, so he could not recall what day this occurred. Subsequent to the interview, he provided his tally book which showed his attendance at Well A-21D on December 10, 1990, from 6 p.m. to 9 p.m. Previously, the wireline operator's work hours had constantly been from 6 a.m. to 6 p.m. when working on wells. Also, review of this particular wireline operator's wireline tickets demonstrates that he indicates on the ticket when he pulls or reinstalls a plug.
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> After considering all of the information in the case file, it is determined that the SSSD for Well A-21D was not in the well from October 3 through December 9, 1990, and was dropped in on December 10, 1990.

(Feb. 14, 1996, Reviewing Officer's Decision re GOM 95-08 at 3-4.) The Reviewing Officer then concluded:

> Based upon a complete review of the evidence in this case, including all matters disclosed at the December 12, 1995, hearing, I find that W&T [Offshore] did violate 30 C.F.R. § 250.121(h)(1) and 250.20(a) for Well A-21D, South Marsh Island Block 6. In consideration of all circumstances of the violations a penalty of $49,400 is hereby assessed against W&T [Offshore]. This penalty amount is based on the following:

Alleged Violations	Date of Violation	Days	Amount	Total
30 C.F.R. § 250.121(h)(1)	October 18, 1990 - November 4, 1990	18	$800	$14,400
30 C.F.R. § 250.121(h)(1) & § 250.20(a)	November 5, 1990 - December 5, 1990	31	$1,000	$31,000
30 C.F.R. § 250.121(h)(1)	December 6, 1990 - December 10, 1990	5	$800	$4,000

Id. at 4-5.

Following receipt of the final Reviewing Officer's decisions, W&T Offshore appealed to the Director, MMS, pursuant to 30 C.F.R. Part 290 (1996). On appeal, it argued that the regulatory requirements that tubing plugs or SSSD's be installed in wells open to hydrocarbon-bearing zones capable of natural flow were not applicable because it was subsequently determined that the wells in question were in nonhydrocarbon bearing zones. It also challenged MMS' application of 30 C.F.R. § 250.121(h) (1996) to three of the wells, claiming that the application of that regulation was not appropriate because the wells had Sundry Notices. It also claimed that no violation existed because the wells were incapable of flow at that time. Noting that the reviewing official was subordinate to the MMS official who initiated the civil penalty investigation and consulted "ex parte" with that official and other MMS employees, W&T Offshore argued that its procedural due process rights had been violated. W&T Offshore also urged MMS to find that the amount assessed by the reviewing official was excessive, citing the nature of the violation and mitigating circumstances.

In his November 7, 1997, decision, the Associate Director addressed each argument. After outlining the history of W&T Offshore ownership and its violations, he explained that MMS is required to impose certain obligations on lessees to carry out the purposes of the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. §§ 1331-1356 (1994). He expressed that Congress mandates that any holder of a lease or permit shall maintain all operations in compliance with regulations intended to protect persons, property, and the environment on the Outer Continental Shelf (OCS), citing 43 U.S.C. § 1348(b)(2) (1994). He added that 43 U.S.C. § 1348(c) (1994) directs the Secretary to promulgate regulations providing for scheduled on-site inspection of each facility on the OCS which is subject to applicable environmental or safety regulations including inspection of all safety equipment designed to prevent or ameliorate blowouts, fires, spillage, or other major accidents. He finally observed that in 43 U.S.C. § 1350(b) and (c) (1994), Congress has established civil and criminal penalties for violation of lease terms, safety regulations, or falsification of records.

The Associate Director then referred to the regulations at 30 C.F.R. Part 250 (1996), which generally require installation and maintenance of a variety of environmental protection and safety equipment designed to prevent or ameliorate blowouts, fires, spillage, or other major accidents and

the specific regulation at 30 C.F.R. § 250.121(a) (1996), which requires an SSSD in the production tubing if the installation is open to a hydrocarbon-bearing zone and the well is capable of sufficient natural flowing pressure to lift the oil and/or gas product to the surface. He explained that an SSSD is a plug or valve that is usually installed approximately 100 feet below the ocean floor to prevent the flow of oil or gas to the surface in the event of failure of the master valve, because serious fires, collisions with vessels, or major storms could damage a well's master valve or make it inaccessible and the SSSD serves as a last resort for shutting off the hydrocarbon flow.

The Associate Director reported that an SSSD is not required if, after application and justification, MMS determines that the well is incapable of natural flow, and that 30 C.F.R. § 250.121(h) (1996) allowed temporary removal of an SSSD during routine operation (without notice to or receiving authorization from the MMS) for a period not to exceed 15 days. He related that the regulations define a routine operation as any of 12 specifically identified operations generally performed to maintain or restore the productivity of a well or to test and inspect an SSSD, and that the 12 routine operations are usually performed using equipment known as a wireline unit, which uses a large spool of wire rope to lower a variety of tools into a well.

He explained that for a civil penalty to be appropriate under 43 U.S.C. § 1350(b) (1994) and 30 C.F.R. § 250.200(a)(1) (1996), a violation must occur and the violation must increase the risk of harm to the environment, human life, or property, based upon the facts known to exist at the time of the violation. He concluded that "[t]hose conditions existed for the violations involved * * *." (Decision at 6.) He then addressed the specifics of each violation.

Violations GOM 95-06 and GOM 95-07 were addressed first. He noted that W&T Offshore was cited for having violated 30 C.F.R. § 250.121(h)(3) (1996), which governs monitoring of wells during temporary removal of SSSD's for routine operations, and that this provision states, in part: "A platform well shall be monitored, but a person need not remain in the well-bay area continuously if the master valve is closed. If the well is on a satellite structure, it must be attended or a pump-through plug installed * * *." He stated that the wells involved in GOM 95-06 were satellite structures and unmanned facilities and the SSSD's were removed and the wells were left unattended for a total of 30 days. He reported that the wells involved in GOM 95-07 were also satellite structures and had been left unattended for a period of 68 days.

He next addressed violation GOM 95-08, stating that W&T Offshore was cited for violating 30 C.F.R. § 250.121(h)(1) (1996) which states, in part, "Each wireline- or pumpdown-retrievable subsurface safety device may be removed * * * for a period not to exceed 15 days," and related that the SSSD was removed from Well A-21D for a period of 54 days in excess of the grace period.

Reviewing W&T Offshore's allegations on appeal, the Associate Director first examined W&T Offshore's contention that there was no threat of serious, irreparable, and immediate harm in any of the cases and no violations of MMS regulations occurred. W&T Offshore asserted that since it subsequently determined that these wells were in nonhydrocarbon bearing zones, there can be no violation. Noting that the cases all dealt with the regulatory requirement to install and maintain tubing plugs or SSSD's in wells open to hydrocarbon-bearing zones capable of natural flow, the Associate Director found that W&T Offshore's claim that the zones were nonhydrocarbon-bearing failed. He reasoned that the purpose of the wireline activity was to attain wells capable of producing and that, under 30 C.F.R. § 250.121(a) (1996), a well must have an SSSD "unless, after application and justification, the well is determined by the District Supervisor to be incapable of natural flowing."

Responding to W&T Offshore's contention that the regulations under 30 C.F.R. § 250.121(h) (1996) are inapplicable to the three wells with approved Sundry Notices (Wells Nos. B-6, 29, and 34), the Associate Director stated that under 30 C.F.R. § 250.103 (1996), Sundry Notices are required for any well-workover operation not considered to be routine, and that 30 C.F.R. § 250.91 (1996) defines routine operations as any of the listed operations conducted on a well with the tree installed. He found that a review of the Sundry Notices showed that the work W&T Offshore intended to do was nonroutine, but that not all of the work performed on the wells was included in the Sundry Notices. He reported that the MMS review of the wireline tickets showed that, for all of the wells, the operations being conducted at the times in question were routine operations, and the existence of Sundry Notices did not preclude the operator from being responsible to abide by the regulations governing routine operations. He specifically found that the operations in question represented a threat because, should anything have happened to the wellhead, there would have been no downhill safety device to prevent well flow, a situation which could result in a pollution event or a fire hazard.

Responding to W&T Offshore's contentions that neither a violation nor a threat existed because the wells were incapable of flow, the Associate Director noted that a no-flow test had not been performed on any of the wells, and it was, therefore, speculative to characterize them as incapable of flow at the time of the violations. He stated that, in fact, wireline work was being performed because W&T Offshore believed that the wells were capable of producing. He also reasoned that the Sundry Notices support a determination that there could have been flow, since the Notices include activities intended to bring the wells into production. He found that a threat did exist at the time of the violations since it was unknown, while wireline work was being performed, whether the wells were capable of flow.

The Associate Director next reviewed W&T Offshore's assertion that it was not afforded "due process of law" by MMS when the agency assessed civil penalties. Recognizing that under both the Fourteenth Amendment to the Constitution and the Administrative Procedure Act (APA), 5 U.S.C.

§ 551 (1994), a party has a right to procedural due process before being forced to pay a monetary fine, he determined that there was no due process violation in this case. He first noted that the penalties for failure to comply with regulations are authorized by statute, and that there is no provision for excusing the civil penalties because safety violations "caused no damage" or because there have been "no subsequent similar violations." Further, he found no risk of erroneous deprivation of W&T Offshore's due process rights as a result of deficiencies in the procedures used by the Reviewing Officer because the Department's regulations provide for an appeal from the Reviewing Officer's decision to this Board, in conformance with 5 U.S.C. § 554 (1994). He noted that the full procedural formalities of 5 U.S.C. §§ 556 and 557 (1994) are applicable to IBLA proceedings, thereby insuring full protection of required due process rights. The Associate Director further opined that 5 U.S.C. § 554 (1994), by its own terms, does not apply to all agency proceedings.

He stated that the appointment of a Reviewing Officer, and the initiation of a "hearing" to aid in gathering facts is not required by statute, and the "hearing" held by a Reviewing Officer is an interim proceeding which is not subject to the APA. He related that when Federal agencies make final determinations of a quasi-judicial nature, the parties are accorded traditional safeguards, but when an agency is conducting an adjudicatory fact-finding investigation, which is subject to later adjudicatory review, rights such as apprisal, confrontation, and cross-examination generally do not apply. He concluded that the Reviewing Officer was not vested with the authority to make adjudicative decisions, but that the Department has expressly provided for a Hearings Division and various Boards of Appeal authorized by the Secretary to conduct those hearings required by the APA. He declared that the formal APA procedural due process requirements would apply only after W&T Offshore had exhausted its appeal to the Director of MMS.

He then reviewed W&T Offshore's suggestion that an appearance of impropriety existed because the Reviewing Officer was a subordinate of an MMS official involved in the investigation, and concluded that the APA is violated only when an individual actually participated in a single case as both prosecutor and adjudicator. He remarked that the combination of investigative and decision-making functions within an agency does not violate due process, and under the APA it is the individual adjudicator, and not the agency, that is barred from combining investigative and judicial functions.

He then examined 5 U.S.C. § 554(d) (1994), cited by W&T Offshore for the proposition that "[t]he employee who presides at the reception of evidence * * * may not:

> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

> (2) be responsible to or subject to the supervision or direction of an employee or agency engaged in the performance of investigative or prosecuting functions for an agency.

Referring to 5 U.S.C. § 554(a)(3)-(6) (1994), he concluded that W&T Offshore failed to recognize that Congress specifically exempted proceedings involving decisions resting solely on "inspections, tests, or elections" from the APA's procedural requirements. He stated that designation of a non-APA "hearing" officer to consider challenges related to such exempted issues was not inconsistent with the APA. He finally determined that whether an agency has looked beyond the record without opportunity to a party for rebuttal (i.e., conducted "ex parte" investigation) does not invalidate its action unless substantial prejudice is shown to result, and found that W&T Offshore has shown no "substantial prejudice" from the Reviewing Officer's alleged "ex parte" consultations with other MMS employees on facts pertaining to particular safety devices and methods.

Responding to that portion of W&T Offshore's appeal based on equitable grounds, the Associate Director stated that MMS is not bound by statutes of limitations or barred by acts of their officers in actions initiated to enforce a public right. Noting that the Department has proposed civil penalties in its sovereign capacity and as an exercise of its police powers for the purpose of public safety and environmental protection, he rejected W&T Offshore's attempt to invoke laches.

He further rejected W&T Offshore's argument that MMS' delay in prosecuting these cases justified dismissal of the proceedings, stating that the civil penalty action had proceeded from the initiation of the proceeding to his decision within a little more than 2 years. He remarked that, although it took several years for the criminal investigation to conclude, during much of that time W&T Offshore was aware of the investigation and had ample opportunity to gather and retain evidence. He also reasoned that the ongoing criminal investigation may, of itself, have been sufficient reason to hold civil penalty proceedings in abeyance. Noting that the civil penalty cases were initiated within months after the Justice Department decision to decline criminal proceedings, he cited W&T Offshore's admission that during that period it had disposed of the records it now asserts to be indispensable to its defense. He concluded that, with respect to those documents, W&T Offshore tendered nothing more than the unsubstantiated assertion that there might have been documents which could have provided some defense to its actions but had not identified any document or witness unavailable prior to his decision.

He also rejected W&T Offshore's equitable estoppel arguments, concluding that the doctrine is applied only in situations involving misrepresentations of fact or law directly leading to detrimental reliance by the aggrieved party, and is rarely invoked to prevent the Federal Government from enforcing the law. Examining W&T Offshore's claim that the doctrine should be applied because it disposed of the necessary records after an IG agent told W&T Offshore's counsel that MMS planned to take no further

action because the U.S. Attorney's Office declined to criminally prosecute, he determined that no reliance on that statement may be deemed to have accrued, since no evidence had been identified as having been "lost." He further found that W&T Offshore's reliance on the statements by the IG in the criminal matter were misplaced because the IG agent was not an employee of MMS, and had neither apparent nor actual authority to speak for MMS. He specifically held that the agent's statement could not be imputed to MMS.

With respect to the final issue, whether the amount of the penalty was excessive, the Associate Director rejected W&T Offshore's arguments. He examined 30 C.F.R. § 250.206(a) (1996), which provides that if and when a civil penalty is deemed to be appropriate the penalty amount shall not exceed $20,000 per day, and held that consideration was appropriately given to mitigating circumstances. He then reviewed W&T Offshore's suggestion that MMS should harmonize its interpretation of 30 C.F.R. § 250.206(a)(1) (1996) to "allow assessment of penalty commencing the day after a violation occurred," based on the language in § 250.206(a)(1), that "for each day the violation continues after" and "for each day the violation continued after." He concluded that under 30 C.F.R. § 250.206(a)(1) (1996), penalties are based on the type of violation, with a maximum penalty of $20,000 per day per violation, and found that the penalty assessed depended on which of two types of violations occurred: those described in 30 C.F.R. § 250.200(b)(1) (1996) or those described in 30 C.F.R. § 250.200(b)(2) (1996). He stated that the first group involves the expiration of a time period. In those cases, the violator is notified of the violation and given time to correct the violation and if the violator does not correct the violation in the given amount of time, penalties may be assessed for each day the violation continues after notice and a reasonable period for corrective action. He then remarked that the second type of violation involves violations that constitute a threat of serious, irreparable, or immediate damage to life or the environment. For the latter group, no time is given to correct the violation before assessment of a penalty and a penalty is assessed for each day the violation continued after it first occurred. Reviewing the penalty amounts he determined that the penalty amounts assessed by the Reviewing Officer were appropriate for the violations and circumstances, and were not excessive.

In conclusion, the Associate Director held that the determination that the removal of subsurface safety devices violated 30 C.F.R. § 250.121 (1996) and found the civil penalties correctly assessed. He then denied the appeal.

W&T Offshore appealed to this Board and submitted a detailed Statement of Reasons (SOR) with its notice of appeal. MMS filed an Answer.

W&T Offshore begins its SOR by stating that penalty provisions, even those involving civil penalties, should be strictly construed. It argues that MMS failed to meet its burden of proof, advancing a number of reasons for concluding that MMS failed this test. It alleges that the Associate Director erred when holding that a civil penalty is appropriate under

43 U.S.C. § 1350(b) (1994) and 30 C.F.R. § 250.200(a)(1) (1996) for a violation deemed to have occurred if, based upon the facts known to exist at the time of the violation, the action has increased the risk of harm to the environment or life. Urging the Board to find this conclusion to be in error, it asserts that pertinent statutes and regulations reflect nothing about grounding a violation on an increased risk determined by "facts known to exist at the time of the violation." It argues that the statutes and regulations are drafted in objective terms unrelated to the state of knowledge of the actual facts.

Challenging the Associate Director's conclusion that the Sundry Notices did not control because the operations could be defined as "routine" and Sundry Notices may not preempt application of other regulations, W&T Offshore argues that no authority is cited for this proposition or for any other guidance in evaluating the interaction of the regulations when Sundry Notices are involved. It asserts that the Sundry Notice procedure is a legitimate alternative to routine work as defined in the regulations. It argues that work performed pursuant to a Sundry Notice commonly involves pulling SSSD's to re-work wells, sometimes for lengthy periods. Specifically noting that the Sundry Notices state that SSSD's will be pulled, W&T Offshore contends that the Associate Director's conclusion is questionable in light of the Department's policy of construing ambiguous regulations so as not to disadvantage a lessee and the general principle that penal statutes be strictly construed.

W&T Offshore challenges the Associate Director's conclusion that a failure to install an SSSD constitutes a violation because the purpose of the activity was to attain wells capable of producing even though some of the zones were subsequently deemed to be nonhydrocarbon-bearing zones. W&T Offshore argues that this is a logical fallacy because these zones were watered out and bore no known hydrocarbons at the time, and that this fact was reflected in the prior owner's reports. It emphasizes that these zones were ultimately proven to be nonhydrocarbon-bearing zones incapable of natural flow.

W&T Offshore contends that the Associate Director inadequately considered whether MMS complied with its Penalty Program Guidebook. It argues that the civil penalties statute contemplates notice to a party not in compliance with a statute, lease, or regulation and the grant of a reasonable period to take corrective action before civil penalties may be imposed. It specifically quotes the following portion of 43 U.S.C. § 1350(b)(1) (1994):

> Except as provided in paragraph (2), if any person fails to comply with any provision of this Act, or any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under this Act, after notice of such failure

> and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than * * *.

(Emphasis added.) Noting that paragraph (2) is an exception to the general rule, W&T Offshore argues that penalties are discretionary rather than mandatory under paragraph (2). It then contends that the civil penalties MMS is trying to impose are based upon paragraph (2) of part (b) of the statute which states:

> If a failure described in paragraph (1) constitutes a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action.

See 43 U.S.C. § 1350(b)(2) (1994); see also 30 C.F.R. § 250.200(b)(2) (1996). W&T Offshore further argues that neither the statutes nor the regulations provide any additional guidance as to what constitutes a threat or what is serious, and according to 30 C.F.R. § 250.203(a)(3) (1996), the only way a serious threat exists is to consider the "information available at that time." W&T Offshore contends that, when applying 30 C.F.R. § 250.203(a)(3) (1996), the Reviewing Officer should dismiss the case and remand it rather than impose a penalty if

> for a violation under § 250.200(b)(2) of this part, there is not substantial evidence on the record that, at the time of the discovery of the violation or during a time prior to the discovery of the violation, the violation constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment.

(SOR at 6.) W&T Offshore emphasizes its contention that this section does not refer to what is known at the time of or preceding discovery of a violation, but whether a violation constituted a serious threat when it occurred, and focuses on what exists, not what is known.

W&T Offshore contends that under the exception in 43 U.S.C. § 1350(b)(2) (1994), civil penalties may be imposed without notice and opportunity to take corrective action only when the evidence demonstrates that a serious threat actually existed at the time, which it argues is not the same as "based on the information available at the time." It further argues that the Associate Director erred by justifying the imposition of civil penalties on the basis of it being unknown whether the wells were capable of flowing at the time of the alleged violation. Pointing to the Associate Director's statement that subsequent tests demonstrated the lack of flow, W&T Offshore concludes that no threat of serious harm could have been posed by the absence of a downhole safety device designed to prevent well flow.

W&T Offshore points to MMS' Penalty Program Guidebook as providing guidelines to the Reviewing Officer in making penalty determinations. Specifically it cites the following language:

> A violation may be considered as posing a threat of serious irreparable or immediate harm or damage to the marine and coastal environment if there is documentable or documented evidence that it is causing, has caused, or could have caused:
>
> - Discharge of oil, nonpermitted drilling fluids, and toxic, chemical, liquid or solid wastes and pollutants into the ocean; or
> - Harm, death/injury of seabirds, fishes, or marine mammals; or
> - Destruction or disturbance of any biological, archaeological, or historic resources; or
> - Harm to endangered and threatened species protected under applicable lease stipulations; or
> - Destruction or pollution of coastal wetlands, wildlife/fish habitats, beaches, lagoons and salt ponds; or
> - A violation of State/County air quality standards, as may be identified by any Federal, State, or local agencies implementing provisions of Federal or State laws applicable to the OCS operation from which the violation is cited.

(MMS Penalties Program Guidebook at 7.) W&T Offshore avers that none of the adverse effects outlined in the Guidebook occurred at any of the wells, and none is alleged by MMS. It also asserts that an allegation that a violation "could have caused" damage or harm requires evidence and, because the wells were not capable of flow, the MMS determination is unsupported.

Addressing the Associate Director's conclusion regarding the existence of a threat, W&T Offshore asserts that the Director basically quoted without support of actual evidence the Reviewing Officer "analysis" of the threat posed, which, in turn she had adopted from reports and memoranda of her superiors. It remarks that the Reviewing Officer's observations regarding the SSSD's, which are found in each decision, amount to mere speculation, not analysis, and are conclusory. It alleges further that while the alleged violations may have been documented, the factual bases for concluding that there was a threat of serious harm were not. It argues that if "could have caused" is taken to include an infinite universe of possibilities involving multiple contingencies, one might be able to say that a "threat" existed, but the law requires proximate cause or, at least, potential proximate cause to support the conclusion that a threat existed. It states that the Guidebook emphasizes the need for documented evidence that the alleged violation could have caused harm.

W&T Offshore contends that MMS' observations that SSSD's are final safety devices and that fires, explosions, major storms, and ship collisions could cause wellhead equipment failure are also mere speculation. It notes that the Reviewing Officer and Associate Director both concluded that it would be "speculative" to say the wells involved in violation GOM 95-06 were incapable of natural flow since tubing pressure existed in all of the wells except Well 29. It then claims that, as a result, they speculated that if an accident had occurred the wells could have flowed naturally, even though the Reviewing Officer subsequently reached a conclusion based on the fact that subsequent operations determined the wells would not flow and the Director concurred with her conclusion. It states that the objective fact that the wells would not flow is determinative of the potential threat regardless of when it was determined, because if the wells would not flow there was no threat of serious harm.

The Board is urged to find that the circumstances of the alleged violations were no longer in existence when MMS asserted its claims, because the fact that the wells "would not flow" is dispositive. W&T Offshore states that if the wells would not flow, there was no possibility that the alleged violations could have caused serious, irreparable, and immediate harm.

W&T Offshore contends that it is questionable whether the alleged violations of 30 C.F.R. § 250.121(h)(3) (1996) were possible given that the wells were incapable of natural flow. Noting that the regulation states that when performing routine operations not requiring a Sundry Notice, SSSD's may be removed for up to 15 days without notice or authorization but that the wells must be "attended" if on a satellite structure, it contends that, with respect to at least three of the wells (Wells B-6, 29, and 34), the Reviewing Officer noted that the work was being performed pursuant to a Sundry Notice, and that 30 C.F.R. § 250.121(c) (1996) states that: "All tubing insertions open to a hydrocarbon-bearing zone which is capable of natural flow shall be equipped with a surface-controlled SSSU [SSSD] * * *." W&T Offshore iterates its argument that a violation cannot occur unless the well is capable of natural flow, and it was subsequently determined that the wells were incapable of natural flow.

Referring to testimony before the Reviewing Officer regarding GOM 95-06, it states that W&T Offshore's routine practice was to have vessels moored at the satellite structure to provide power when wireline work was being performed, and that the attending vessels had living quarters where the crew could stay, meaning the satellite structure would be "attended" when the crew was quartered on the vessel moored at the satellite structure. It states that when the Reviewing Officer relied on the lack of helicopter and boat logs to support the conclusion that the satellite structures were unmanned, it was because those records were likely the victim of the inordinate delay of the MMS in bringing the cases.

W&T Offshore contends that similar considerations apply to GOM 95-07. The work on Well 34 was being performed pursuant to a Sundry Notice and,

according to W&T Offshore, it was routine to have the vessel which moved the wireline crew to the satellite platform provide sleeping quarters while working on platforms lacking crew quarters, and if wireline work was performed on consecutive days the vessel would stay at the platform with personnel quartered on the vessel overnight. It contends that the fact that there was no corroborative paperwork supporting this was not surprising, given the loss of records occasioned by the long delay in bringing the cases, and that this same delay also accounts for testimony being limited to routine practice, as it would be almost impossible for someone to remember where he slept 5 years after the events.

W&T Offshore refers to testimony that the status of the wells is key in these cases. It notes that work was performed pursuant to a Sundry Notice dated April 13, 1990, and approved by MMS on April 17, 1990, and that the wireline work commenced in May 1990. It explains that available records indicated tubing pressure varied from a maximum of 50 p.s.i. down to zero and the wireline operator noted on August 24, 1990, that the well was "flowed" for 20 minutes. Its expert testified that the well was not capable of sustained flow. (Transcript at 12-25.) W&T Offshore believes that the Reviewing Officer apparently based her conclusion that the well could have flowed naturally upon these minimal pressures (which were noted to have bled off almost immediately). It then refers to the well record notation that the well had "watered out" in 1976 when that well was owned and operated by Texaco and the fact that in the intervening years before W&T Offshore's acquisition of the well in 1989, Texaco had obtained waivers from MMS based upon the fact that the well was logged up and incapable of flowing. It states that Texaco had taken the well off production in 1976, and that when it was tested in 1979, 69 barrels of 100-percent water were recovered. It further reports that subsequent annual documents prepared by Texaco note that the well was incapable of flowing. Pointing to testimony that the well had been shut in, the zone had watered out, and it was incapable of production due to watering and tubing, W&T Offshore avers that the wireline work under the Sundry Notice was an unsuccessful attempt to return the well to production. W&T Offshore notes that this testimony and the documentary evidence were unrebutted.

W&T Offshore again stresses that the work was undertaken under a Sundry Notice, and that 30 C.F.R. § 250.121(h) (1996) specifically refers to work which does not require a Sundry Notice. It argues that it is questionable, at best, whether the regulation is applicable to alleged violations at wells under a Sundry Notice. It contends further that when the Associate Director stated that this distinction made no difference because some of the operations it had performed were "routine," he could cite no authority for application of this regulation when work was being performed under a Sundry Notice. It argues further that 30 C.F.R. § 250.121(c) (1996), requires SSSD's in all tubing installations "open to a hydrocarbon-bearing zone" "capable of natural flow" but that Texaco documents, well documents, and testimony presented to the Reviewing Officer establish that the well was incapable of natural flow and that it was not open to a hydrocarbon-bearing zone because that zone had "watered out." It

further asserts that there is no evidence that any of the wells cited in GOM 95-06 and GOM 95-07 was open to a hydrocarbon bearing zone at any material time, concluding that no violation of the cited regulation could have occurred.

W&T Offshore next refers to the purported violations of 30 C.F.R. §§ 250.121(h)(1) and 250.20(a) (1996) in GOM 95-08, stating that both regulations depend upon a finding that there was no SSSD installed between October 3, 1990, and December 10, 1990. Recognizing that this well was open to a hydrocarbon-bearing zone, W&T Offshore points to testimony that the well was incapable of sustained natural flow during that period in support of its contention that the lack of an SSSD did not pose a threat of serious, irreparable, and immediate harm. Recognizing a modest tubing pressure recorded on the well, W&T Offshore contends that the well was incapable of bringing the column of fluid to the surface or sustaining flow.

Addressing testimony regarding the fact that the wireline tickets failed to note reinstallation of an SSSD, W&T Offshore points out that the failure did not mean that it had not been installed. It postulates that the inspector presumed that the SSSD was not in place because there was an indication of tubing pressure. It states that this assumption is erroneous because the SSSD used would allow some tubing pressure to show, because it shuts in only when flow exceeds its design parameters. It also points to testimony that during the inspection on December 11, 1990, W&T Offshore's employee said that the SSSD had been reinstalled even though reinstallation was not noted on the wireline ticket, the MMS inspector did not accept this explanation, and the SSSD was then pulled in his presence.

W&T Offshore challenges the Reviewing Officer's finding that the SSSD was pulled on October 3, 1990, was out of the well through December 9, 1990, and dropped into the well on December 10, 1990. W&T Offshore expresses its understanding that this was based on the fact that none of the wireline tickets issued between October 10 and October 22 indicated that it had been replaced, the next indication of work on the well was a notation on December 10, with no reference to the work done, and the SSSD was pulled again on December 11, 1990. W&T Offshore maintains that since the wireline tickets dated October 3 and December 11, 1990, both recited that an SSSD was pulled, and no wireline ticket issued between those dates reflected when it was installed, the deduction must be that it was reinstalled after the last wireline work on October 22, 1990. It notes that the Reviewing Officer took note of the logic of this deduction but relied on other information she found in the file.

In an IG interview with the wireline operator who pulled the SSSD on December 11, 1990, the wireline operator stated that he was instructed to drop the SSSD in the well but refused to do so, but could not recall what day this occurred. Subsequent to the interview, he provided his tally book which showed his attendance at Well A-21D on December 10, 1990. Review of

this particular wireline operator's wireline tickets shows that he would indicate on his ticket when he pulls or reinstalls a plug. 2/

W&T Offshore argues that the problem with the Reviewing Officer's conclusion is that the record of interview with the wireline operator on July 17, 1993, is totally insufficient to support the inference that the SSSD was dropped into the well on December 10, 1990. It notes that the interviewer asked the wireline operator why the wireline ticket dated October 3, 1990, reflected that the SSSD was removed but there was no record of the SSSD being replaced before the December 11, 1990, wireline ticket noted its removal, and that the wireline operator acknowledged that the handwriting and signature on the December 11, 1990, wireline ticket was his and affirmed that he pulled an SSSD on December 11, 1990. The wireline operator did recall an occasion when he was asked to drop the SSSD in the well but refused to install the SSSD as requested.

W&T Offshore postulates that the Reviewing Officer arrived at the December 10, 1990, installation date based on the wireline operator's tally book notation that he was at Well A-21D for 3 hours on that date. It interprets the tally book in a different manner, however, stating that the tally book reflecting work on Well 43, with a penciled-in notation just above the December 10, 1990, reference to work on Well 43, stating: "Worked on SMI-6-A-21D (1800-2100)," with no reference to the nature of the work he may have done. It points to the contrast with his tally book entry for Well A-21D dated December 11, 1990, stating that he removed a storm choke and reset a plug. Noting that wireline ticket 19144 was not among the documents presented at the hearing, W&T Offshore states that IG Agent Murphy's review of records reflects that wireline ticket 19144 showed the wireline operator having worked 15 hours on Well 43 on December 10, 1990 (not 12 hours on Well 43 and 3 hours on Well A-21D).

W&T Offshore states that, notwithstanding the inconsistency between the tally book and the wireline ticket, there is no factual predicate for the Reviewing Officer's finding that the SSSD was dropped into the well on December 10, 1990. It states that it is important to the finding that the wireline operator provided his tally book after his interview, but was not reinterviewed after he submitted the tally book to determine whether his recollection was refreshed or that he recalled that the SSSD was dropped on December 10, 1990. It finds significance in the fact that the tally book entry makes no reference to the dropping of an SSSD on December 10, 1990, and that there is no record of any other wireline work by other wireline personnel on Well A-21D on December 10, 1990. It states that there is no wireline ticket reflecting any wireline work on A-21D on December 10, 1990, but evidence that the wireline operator did work on Well A-21D in October 1990, concluding that there is no apparent reason why the SSSD could not have been dropped into the well in October 1990, and there is absolutely no evidence to contradict the logic of the deduction that the SSSD was reinstalled on October 22, 1990, but not noted on the wireline ticket.

2/ This was not the same operator that did the work in October.

The next topic addressed in the SOR was W&T Offshore's contention that it was denied due process. It complains that the Reviewing Officer was subject to supervision of an MMS employee who investigated and prosecuted cases and conducted impermissible ex parte contact with MMS personnel regarding the issues in these cases.

W&T Offshore argues that 43 U.S.C. § 1350(b) (1994) requires an APA hearing. Addressing the Associate Director's conclusion that the APA is not applicable because it specifically exempts proceedings involving decisions resting solely upon "inspections, tests, or elections," W&T Offshore contends that the hearing in this case was not an exempted proceeding because the Reviewing Officer heard testimony and accepted evidence in the hearing convened to adjudicate this matter. Noting the Associate Director determined that a non-APA hearings officer could hear challenges related to exempted issues in a non-APA setting, W&T Offshore contends that a "formal hearing" was required in this case because the facts were in dispute and the conclusions were not obvious so as to afford the complaining party a "fair hearing."

Addressing the Associate Director's final finding on the issue of due process, that the APA does not apply to hearings assessing carefully restricted fines, W&T Offshore argues that imposition of civil penalties potentially totaling $20,000 per day per violation is hardly akin to the maximum fine of $5,000 in the case cited by the Associate Director. It further asserts that the phrase "on the record" is not required to prompt the need for an APA hearing, when the substantive character of the assessment is determined from the facts.

W&T Offshore avers that it is particularly aggrieved by the fact that the immediate supervisor of the Reviewing Officer "put the case together" and objects to the fact that the Reviewing Officer was his direct subordinate. It argues that this situation is directly contrary to the 5 U.S.C. § 554(d)(2) (1994) requirement that the Reviewing Officer should not be responsible to or subject to the supervision of an employee engaged in investigative or prosecuting functions for the agency. It further contends that these facts, at the very least, create an appearance of unfairness.

W&T Offshore further argues that due process principles also require that the adjudicator not have ex parte conversations with any person or party addressing the merits of the case or a fact in issue unless an opportunity is provided to all parties to participate. It cites admissions of ex parte conversations in the record, and contends that this conduct also violates MMS' own guidelines providing that all discussions regarding the merits of a case must be in writing and made part of the record so that a party may respond to them at the hearing. Noting that the Associate Director decision held that the Reviewing Officer's decisions should stand regardless of ex parte contacts, W&T Offshore argues that it is impossible to demonstrate prejudice beyond the appearance of unfairness because the nature of communications and information during those communications is

not known. It urges the Board to look at the Reviewing Officer's communications, particularly to whether they contain factual matters or other information outside of the record which the parties did not have an opportunity to rebut, and find that the Reviewing Officer discussed factual matters and information, without describing those conversations in the record and, therefore, the information conveyed to her during those conversations was unknown to W&T Offshore.

The next topic addressed in the SOR is W&T Offshore's claim of the equitable defenses of laches and estoppel. Recognizing that reliance upon Government conduct or misinformation may not create rights unauthorized by law, W&T Offshore postulates that circumstances may exist where the Government can be estopped when a party acts in reliance on Government conduct and is prevented from obtaining a right. It argues that citizens are entitled to a reasonable opportunity to defend against that right not being given. It then sets out the circumstances it believes show why the Government should be estopped. After noting that the civil penalties imposed arise out of alleged violations of regulations which occurred in 1990 and 1991, it states that in January 1994 W&T Offshore was notified that certain of its employees were the subject of a Grand Jury investigation stemming from alleged violations of MMS regulations. During the course of this investigation W&T Offshore obtained records from its successor-in-interest and voluntarily submitted those records to MMS. It reports that the matter languished for years without MMS action, other than periodic contacts with a series of "new" agents who were successively assigned to the investigation. It notes that early in 1994, W&T Offshore employee, Bethea, met with representatives of the IG office, but nothing further happened until February 6, 1995, when counsel for W&T Offshore was informed that the Assistant U.S. Attorney had declined to prosecute, and that MMS planned no further action. It states that, relying upon those representations and absent any other pending action, W&T Offshore returned records to its successor-in-interest (who apparently disposed of them). W&T Offshore suggests that MMS also lost or discarded many of the records W&T had delivered to it as well. According to W&T Offshore, in May 1995, MMS and other Department of Interior officials reviewed alleged violations of MMS regulations covered in the December 1990 and January 1991 inspections on which the 5-year statute of limitations had not yet expired. 3/ According to W&T Offshore, on August 7, 1995, the Reviewing Officer gave W&T Offshore its first notice of civil penalty action. It notes that these penalty actions arose from incidents which were concluded 4-1/2 years before and involved leases it no longer owned or operated.

W&T Offshore states that it filed a Motion to Dismiss, with supporting documents and affidavits reflecting detrimental reliance, and loss of records, and notes the obvious difficulty of locating witnesses having recall of the historical events. It contends that the evidentiary problems associated with the staleness of the charges is apparent in the Reviewing

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3/ This meeting is also reflected in MMS documents.

Officer's and Associate Director's reasoning respecting certain factual findings which are based in part on W&T Offshore's inability to document certain routine practices and the inability of witnesses to recall the specifics of occurrences several years after the fact.

W&T Offshore alleges that MMS sorted through various allegations based upon stale INC's and brought civil penalty actions on those which were not barred by the statute of limitations. W&T Offshore cites Josephine Coal Co. v. OSMRE, 111 IBLA 316 (1989), as supporting its contention that the cases should be dismissed. W&T Offshore describes the Josephine Coal case as involving a delay of over 5 years between commencement of a civil penalties assessment and a hearing on the alleged violations. Recognizing that the Board declined to invoke laches in Josephine Coal, W&T Offshore argues that the Board acknowledged that circumstances may exist when a delay in bringing proceedings requires application of laches against the Government in the interest of justice. It also contends that factually the Josephine Coal case differs from this one in important respects, namely, in the Josephine Coal case there was only a delay of weeks between the time the inspection revealed the alleged violation and the commencement of the civil penalty assessment and the original hearing was postponed at the request of defendant. W&T Offshore contends that, unlike this case, in Josephine Coal the defendant clearly knew that the civil penalties were being sought for the alleged violations and, therefore, it was on notice of the need to take action to preserve evidence. W&T Offshore claims that it had no notice of any need to preserve evidence during the unexplained delay.

W&T Offshore rebuts the Director's finding that the ongoing criminal referral and investigation was sufficient cause for holding the civil proceedings in abeyance, with the civil penalty proceedings being commenced within months after the Justice Department's decision to forgo criminal proceedings. It claims this determination to be in error because it is contrary to the MMS Guidebook at 8, which states that whenever a criminal case is pursued "a civil penalty case should also be initiated * * * civil penalty cases should be initiated concurrently."

W&T Offshore sets forth three elements which it argues must be present to support a finding of laches: (1) delay in asserting a right or claim; (2) that the delay was inexcusable; and (3) that undue prejudice results from the delay. It applies these elements to the facts before us and claims that the civil penalty cases brought by MMS are a classic example of the circumstances to which the doctrine of laches applies: MMS took some 3 years to bring its criminal referral to the Justice Department; W&T Offshore was able to obtain records to cause the Justice Department to decline to prosecute the criminal charges; no civil penalty proceedings were initiated for more than a year and a half subsequent to the criminal charges being initiated, contrary to MMS policy; MMS delayed another 6 months after the Justice Department declined to prosecute; and no excuse for the delay has been offered by MMS. It also argues that laches must be applied apart from and irrespective of the statute of

limitations, and is available even when the statute of limitations has not run. It asserts that prejudicial harm has resulted because there was a delay which caused a disadvantage in asserting and establishing a defense.

W&T Offshore contends that dismissal would not create hardship on the Government, arguing that civil penalties are not compensatory or otherwise necessary to repair damage caused by defendant's alleged violations of regulations because none of the alleged violations resulted in any damage. It contends that the delay defeats any deterrent effect that might be obtained by prompt action, and, even if W&T Offshore were guilty of technical violations, the violations caused no damage at any time and no subsequent violations of this nature have been observed or cited.

W&T Offshore has submitted affidavits and other materials which it submits to demonstrate its diminished ability to obtain documents necessary to further its defense, and points to testimony submitted at the hearing reflecting a diminished ability to remember the events. It refers to the MMS regulation at 30 C.F.R. § 250.124(b) (1996), which requires an operator to retain records for a term of 2 years, and argues that sufficient evidence exists to reflect prejudice against its ability to adequately present its defense.

W&T Offshore also argues for dismissal on the basis of equitable estoppel. Admitting that courts rarely invoke estoppel against the Government, it suggests that there is no blanket immunity for the Government from invoking the estoppel defense. W&T Offshore refers to the IG agent's declaration to counsel for W&T Offshore after the Justice Department declined to prosecute that MMS planned to take no further action. W&T Offshore objects to the Associate Director's conclusion that the IG agent who investigated the alleged violations on behalf of MMS had no apparent authority to speak for MMS, arguing that MMS is part of the Department of the Interior and the IG agent was an employee of the Department of the Interior representing MMS during the investigation. It states that it was reasonable for its counsel to direct his inquiry to an Interior Department agent acting on behalf of MMS. W&T Offshore again points to MMS' Guidebook guideline that states that criminal and civil proceedings should be instituted concurrently. It states again that, relying on the IG agent statement, records and other evidence potentially helpful to the defense were lost.

W&T Offshore next challenges MMS' version of its compliance history. It alleges that the Reviewing Officer concluded that its compliance history was not good, identified various alleged violations, and observed that, while the alleged violations were not identical, they did involve SSSD's. W&T Offshore alleges that the use of these alleged violations as the basis for asserting that W&T Offshore had a poor compliance history is "boot strapping" of the most egregious sort. It claims that the alleged violations occurred almost exclusively after the factual determinations in this case and, therefore fail to show a pattern of disregard of the regulations or demonstrate willfulness. It notes particularly that the

majority of the alleged violations involved record keeping violations, based on records no longer in W&T Offshore's possession. It avers that only the alleged May 1989 violations were truly prior alleged incidents, W&T Offshore submitted written explanation of those events, and their explanations had been accepted by MMS without comment. After outlining the nature of the May 1989 violations and its explanations to MMS, W&T Offshore asserts that the alleged May 1989 violations were substantially different from those now in issue.

W&T Offshore contends that the Reviewing Officer should have given more credence to other MMS evaluations, noting that W&T Offshore was awarded a "Safety Award for Excellence" for its operations during the period January 1, 1989, through June 30, 1989, for "promoting the practice of operational safety, environmental protection, and compliance with the operating regulations." It contends that this contemporary assessment of W&T Offshore's compliance record is completely at odds with the unsupportable Reviewing Officer conclusions, made some time after the fact. It further contends that the Reviewing Officer's finding that W&T Offshore's compliance history was not good is predicated primarily on the stale INC's at issue in these proceedings and others for which the statute of limitations had run, and which were never the subject of an evidentiary challenge.

The final issue generally addressed in the SOR is the amount of the civil penalty. After stating its belief that imposition of any civil penalty in these cases is inappropriate, unfair, and unjust, W&T Offshore remarks that it must address the amount of the penalties and their method of calculation in order to complete the record on appeal. W&T Offshore begins its argument in this regard by citing MMS' Penalties Program Guidebook list of the initial factors for consideration in determining the amount of any civil penalty assessed. It then addresses each of the eight factors.

Noting that no injury or actual harm resulted from any of the alleged violations and none was alleged, it concludes that three of the eight factors (1, 2, and 8) weigh in favor of a minimal or no financial penalty. It relates that with respect to factor 6, evidence showing that it did cooperate, is also favorable to minimal or no assessment. It then alleges that, with the exception of violation GOM 95-08, the Reviewing Officer did not find carelessness led to the purported violations, a consideration in factor 4 favorable to minimal or no assessment.

W&T Offshore acknowledges that INC's were issued for allegedly similar violations, a condition under factor 5, but contends that no violations have been established which were followed by resistance to compliance and that they had been corrected by the time the INC's were issued. Contending that W&T Offshore has always promptly addressed any challenge to its compliance with OCS requirements and noting its MMS Safety Awards and industry recognition as reflective of its general compliance record, it contends

that factor 7 should be weighed in its favor or deemed neutral, especially considering that the penalties were predicated upon bootstrapping alleged violations after the fact.

Addressing the remaining factor, factor 3, the extent to which persons or the environment is exposed to risk of harm, W&T Offshore contends that no significantly increased risk of harm resulted because the wells were incapable of flow and were therefore not open to a hydrocarbon zone. It contends that the extremely small or absent increased risk of harm militates against the levy of a penalty, or, at most, suggests a minimal penalty.

W&T Offshore argues that, if civil penalties were properly assessed, they should be reduced to reflect the nonexistent or, at worst, negligible increase in risk of harm and the fact that no harm whatsoever resulted from the alleged violations.

In this matter, W&T Offshore assails MMS' interpretation of the regulations allowing imposition of civil penalties for the first and each continuing day of an alleged violation. It contends that the language of 30 C.F.R. § 250.206(a)(1) (1996) does not support the distinction indicated in the Penalties Program Guidebook between violations of 30 C.F.R. § 250.200(b)(1) (1996) (assessed from the day after notice and a reasonable time for correction) and § 250.200(b)(2) (1996) (assessed from the day the notation occurred if the violation constitutes a threat of serious, irreparable, and immediate harm). Arguing that there is no significant difference between the language "for each day the violation continues after" and "for each day the violation continued after," W&T Offshore urges the Board to harmonize MMS' interpretation of these two provisions to allow assessment of penalty commencing 1 day after a violation is found to have occurred.

In a concluding summary of its arguments W&T Offshore states that MMS has assessed civil penalties against W&T Offshore based upon stale incidents which occurred 4-1/2 years before W&T Offshore was given notice of the civil penalty cases and after it had sold the leases at issue. It contends that, other than a conclusory assertion that the alleged violations constituted a threat of serious, irreparable, and immediate harm, the Reviewing Officer and Associate Director provided no documentable or documented evidence that the threat arising from the alleged violations was of a serious nature, or produced any evidence that the threat of harm was of an irreparable and immediate nature. It contends that their conclusory assertions were speculative, built upon multiple and cumulative conjecture, and their conclusions are unsupported by the record. It urges a finding that absent documentable or documented evidence that the violations constituted a threat of serious, irreparable, and immediate harm, civil penalties are only available after notice and reasonable opportunity for correcting, which was not afforded W&T Offshore. W&T Offshore argues specifically that the alleged violations and threat of serious harm have not been adequately proven by a preponderance of evidence. Addressing violation GOM 95-07, W&T

Offshore states that the well was incapable of sustained natural flow and was not open to a hydrocarbon bearing zone, and urges a finding that this well could not have constituted a threat of serious, irreparable, and immediate harm, and that the alleged violation could not have occurred since the well was not open to a hydrocarbon-bearing zone. W&T Offshore argues that there is insufficient evidence to support the Reviewing Officer's conclusion that the SSSD in Well A-21D was not in place. It argues that for those wells on which work was being done pursuant to a Sundry Notice, the regulation is at least ambiguous as to whether it is applicable in that, by its own terms, it speaks of routine operations not requiring Sundry Notice. Noting that civil penalty statutes are to be strictly construed with ambiguities decided against the Government, W&T Offshore argues that the record is incapable of sustaining the Government's case.

An Answer was filed by MMS responding to the SOR. The Answer is divided into five categories, with the first being divided into two subcategories. The first category is MMS' contention that the incidents represent a clear violation and resulted in a clear threat of serious, irreparable, or immediate harm. Noting that the violations identified as GOM 95-06 and GOM 95-07 involved satellite structures and unmanned situations, MMS states that the controlling regulation is 30 C.F.R. § 250.121(h)(3) (1996), which requires SSSD's on unmanned satellite structures. The Answer refers to the two MMS decisions set out in detail above for its statement of the facts of the case.

MMS notes that at the hearing before the Reviewing Officer, several W&T Offshore employees and former employees testified that the structures were either occupied by workers or had SSSD's in place when unoccupied, but the Reviewing Officer chose to believe the information contained in wireline tickets "available for the period." (Answer at 3.) Deemed particularly important to MMS are the notations that the crews rigged down at the end of the day, left the satellite, and rigged up the next morning. The Reviewing Officer chose to accept the contemporary notations as more reliable than the memories of the witnesses 5 years after the events. As a result, the Reviewing Officer concluded that no SSSD's were present during periods that the wells were unoccupied, and MMS urges that this conclusion is reasonable, appropriate, and supported by substantial evidence.

Addressing the argument that SSSD's were not required for wells operating under Sundry Orders, MMS states that Sundry Notices are required by 30 C.F.R. § 250.103 (1996) for nonroutine well-workover operations. Workover operations are defined as work performed for the purpose of maintaining or restoring production. It then notes that if nonroutine work is performed with the tree removed, an SSSD must be in place if the facility is not manned (see 30 C.F.R. § 250.107(e) (1996)) and if the work is routine, an SSSD must be in place if the facility is not manned. It concludes that, in either case the SSSD must be in place if the crew is not on the structure.

Addressing the violation identified as GOM 95-08, MMS notes that this citation was for failure to have an SSSD on a manned facility for a period in excess of 15 days, citing evidence that the SSSD was removed on October 3, 1990, and removed again on December 11, 1990. With respect to the question of when the SSSD removed on December 11 was installed, MMS notes that the wireline tickets it had for October 4, 6, 8, 9, 18, 19, and 22 do not show the removal or installation of an SSSD, and argues that the Reviewing Officer properly concluded that the SSSD had been installed on December 10. MMS states that the record does not contain any evidence of any other wireline work on Well A-21D between October 22 and December 10, 1990, and concludes that the SSSD must have been placed in that well on December 10, when the wireline operator noted that he had worked on the well for 3 hours, but did not note the nature of his work.

Turning to the issue of whether there was a threat of irreparable or immediate harm to the environment, MMS states its opinion that the statement by W&T Offshore's expert witnesses that the wells posed no threat "strains all bounds of credibility." What is important according to MMS is the fact that at some time in the life of each well there had been actual flow of hydrocarbon or significant in-hole pressure. It further noted that in the one well that had recorded minimal pressures, the Reviewing Officer had reduced the daily penalty. Also important to this assessment, according to MMS, was the fact that W&T Offshore had removed the SSSD's to undertake operations intended to restore the production of hydrocarbons from the wells. It notes that a further reason for affirming the penalty assessments is that 30 C.F.R. § 250.121(a) (1996) provides that an SSSD must be installed unless, after application and justification, MMS determines that the well is incapable of natural flow, and no approval for permanent removal of the SSSD had been granted by MMS.

The second issue addressed in the Answer is whether due process has been denied. The first basis argued by W&T Offshore that is addressed by MMS is whether the APA is applicable. MMS argues that it is not because the 5 U.S.C. § 554(a) (1994) formal APA adjudication procedures apply only when adjudications are required by statute to be determined on the record after an opportunity for an agency hearing on the record. According to MMS the operative words are "hearing on the record," and the civil penalty statute in question calls for a hearing, not a hearing on the record. It also contends that the procedural safeguards are insured by this Board's ability to conduct a de novo review of its actions, and states its opinion that "review of the director's decisions by the IBLA is more than adequate to satisfy any obligations MMS has under the APA." (Answer at 12.) MMS concludes by saying that "W&T [Offshore]'s attempt to invoke formal adjudication procedures at the preliminary investigation stages of this administrative process is misguided." Id.

The contention that basic constitutional due process rights were violated is rejected by MMS, observing that the private interest is the payment of monetary fines for violation of MMS regulations prohibiting removal of SSSD's. It explains that the risk that the fine will be erroneously

imposed is slim because W&T Offshore was given full notice of the charges, an opportunity to present evidence and rebut evidence presented against it. Again it notes the safeguard afforded by an appeal to this Board. In addition, it states that it would be burdensome to MMS to impose duplicative formal proceedings when it is carrying out its duties.

The relationship of the Reviewing Officer to the parties preparing the case is not a violation of due process, according to MMS. It further insists that to prevail in this matter, W&T Offshore must show actual bias, which MMS claims W&T Offshore has failed to do. Similarly, MMS argues that to prevail in its accusation of ex parte communications which violate its due process rights W&T Offshore must demonstrate substantial prejudice, and it has not.

The final rebuttal to the due process arguments forwarded by MMS is directed to the W&T Offshore contention that MMS failed to conduct its proceedings in conformance with its own regulations and guidelines. Noting the definition of the term "merits of the case," MMS argues that the discussions the Reviewing Officer had with other MMS employees did not include a discussion of the "merits of the case," using the MMS definition of that term.

The third issue addressed by MMS is W&T Offshore's equitable defenses of laches and estoppel, which MMS argues should be rejected on their face. It first argues that the Government is not subject to the equitable doctrine of laches, except in the most egregious cases, and that this case does not qualify. A similar argument is advanced for rejecting estoppel. It argues that estoppel will only be applied if a Government official gives erroneous advice in the form of a crucial misstatement in an official decision, the results violate the standard of fundamental fairness, and the public interest is not unduly damaged by the grant of estoppel. It argues that none of these requirements is present in this case. Finally it states that the alleged misstatements do not amount to affirmative misconduct.

In response to the W&T Offshore's complaint that the Reviewing Officer failed to consider its compliance history, MMS states that the Reviewing Officer had substantial evidence upon which to base her conclusions, and acted appropriately.

The final issue addressed is W&T Offshore's objection to the amount and manner of calculating the civil penalty. Addressing W&T Offshore's contention that the language of 30 C.F.R. § 206(a)(1), § 250(b)(1), and § 205(b)(2) is so similar that the provisions should be interpreted the same, MMS argues that the violations under 43 U.S.C. § 1350(b)(1) (1994) require prior notice, a period for correction, and a penalty for each day beyond the period of correction, and therefore the penalty period starts after the end of the grace period. It notes the language of 43 U.S.C. § 1350(b)(2) (1994) differs and penalties may be assessed for every day that the violation exists. MMS states that it is obvious that the intent is to calculate the penalty period in the manner that the Reviewing Officer

calculated it. It also states that the penalty amounts are well within the statutory limit, and that W&T Offshore ignored the fact that factors 3, 4, 5, and 7 were present. It states that the failure to install SSSD's is a serious violation, and concludes that the Hearing Officer application of the penalty amount should not be disturbed.

[1] The Secretary of the Interior is authorized under OCSLA, as amended, 43 U.S.C. §§ 1331-1356 (1994), to lease OCS tracts for the exploration and development of mineral resources, including oil and gas. In section 3 of OCSLA, 43 U.S.C. § 1332 (1994), Congress announced that the OCS "is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards" and advises that

> operations in the [OCS] should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstructions to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

Congress directed the Secretary to prescribe rules and regulations deemed necessary to accomplish the stated objectives. See 43 U.S.C. § 1334(a) (1994).

Section 22(b) of OCSLA mandates that any holder of a lease or permit in the OCS is under a duty "to maintain all operations within such lease area or within the area covered by such permit in compliance with regulations intended to protect persons, property, and the environment on the [OCS]." 43 U.S.C. § 1348(b) (1994). Section 22(c) provides for "scheduled on-site inspection [by the Department or the Coast Guard], at least once a year, of each facility on the [OCS] which is subject to any environmental or safety regulation promulgated pursuant to this subchapter, which inspection shall include all safety equipment designed to prevent or ameliorate blowouts, fires, spillage, or other major accidents." 43 U.S.C. § 1348(c) (1994). Sections 24(b) and (c), 43 U.S.C. § 1350(b), (c) (1994), provide for civil and criminal penalties for violation of any term of a lease, violation of a safety regulation, or falsification of required records.

During the period from 1989 through 1992 (the period at issue here) the Department's rules for management of an offshore oil or gas operation were found generally in 30 C.F.R. Part 250 (1996). These regulations required the lessee to install and maintain a variety of safety devices designed to prevent or ameliorate blowouts, fires, spillage, or other major accidents and assigned the responsibility for conducting annual inspections to MMS. MMS was specifically directed to ensure that those devices are installed and operating properly. See 30 C.F.R. §§ 230.4, 250.5, 250.120 (1996). The regulations at 30 C.F.R. § 250.121(a) (1996) required that

all tubing installations open to a hydrocarbon-bearing zone must have an SSSD installed "unless, after application and justification, the well is determined by the District Supervisor to be incapable of natural flowing." Under 30 C.F.R. § 250.121(h) (1996), an SSSD could be removed without giving notice to or receiving authorization from MMS for a period not to exceed 15 days to conduct a routine operation (as defined in 30 C.F.R. § 250.2 (1996)), so long as the well was manned during the period of removal.

The compliance history in this case begins with an inspection in May 1989 resulting in the issuance of 36 INC's. Under the provisions of 43 U.S.C. § 1350(b) (1988) in effect at that time, a party failing to comply with any provision of OCSLA or any of the implementing regulations could become liable for a civil penalty only after notice of such failure and expiration of a reasonable period allowed for corrective action. The statute also provided that the civil penalty could not be assessed until after an opportunity for a hearing had been provided. However, the statute was amended August 18, 1990, by Pub. L. No. 101-380, § 8201, 104 Stat. 570. The language formerly in 43 U.S.C. § 1350(b) (1988) was redesignated as § 1350(b)(1), and the following language, designated as subsection (b)(2), was added as an exception to § 1350(b)(1): "If a failure described in paragraph (1) constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and aquatic life), property, any mineral deposit, or the marine, coastal, or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action." 4/ The identified periods of violation for which civil penalties were assessed began after August 18, 1990, the enactment date of 43 U.S.C. § 1350(b)(2) (1994) (except for the situation in GOM 95-06, Well B-13D, which period began on August 18). Accordingly, MMS had authority under the statute, as amended, to assess civil penalties immediately for any violation existing on or after August 18, 1990, which constituted a threat of serious, irreparable, or immediate harm or damage as outlined by the statute.

[2] Procedural due process imposes certain requirements on Governmental decisions to assure that they will not deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution. "The history of liberty has largely been the history of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1947). "The right to be heard before

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4/ The implementing regulation, 30 C.F.R. § 250.200 (1996), was not amended until May 13, 1991. 56 Fed. Reg. 21954; see 30 C.F.R. § 250.200 (1991). However, all persons dealing with the Government are presumed to have knowledge of relevant statutes. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Chester Wittwer, 136 IBLA 96, 99 (1996); Harlow Corp., 135 IBLA 382, 385-86 (1996). MMS amended these regulations in 1997 (62 Fed. Reg. 42667, 42668, Aug. 8, 1997) and again in 1998 (63 Fed. Reg. 29479, 29487, May 29, 1998). Recently, MMS proposed rules providing that Offshore Minerals Management decisions and orders issued under 30 C.F.R., Chapter II, Subchapter B, may be directly appealed to IBLA. 64 Fed. Reg. 1966, 1990-1991 (Jan. 12, 1999).

being condemned to suffer grievous loss of any kind * * * is a principle basic to our society." Mathews v. Eldridge, 424 U.S. 319, 333 (1976), quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Thus, under the Fifth and Fourteenth Amendments to the Constitution and under the APA, a party has a right to procedural due process before being forced to pay a monetary fine. See Air Transport Assn. of America v. Dept. of Transportation, 900 F.2d 369, 376 (D.C. Cir. 1990).

Due process is not a technical concept with a fixed content unrelated to time, place, and circumstances. It is flexible and calls for such procedural protections as the particular situation demands. Mathews v. Eldridge, supra at 334, quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Due process analysis requires a two-step process of first deciding whether the interest is protected, and then deciding what process is due. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). At a minimum, due process requires that deprivation of life, liberty, or property be preceded by "notice and opportunity for hearing appropriate to the nature of the case." Id. at 428, quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "The fundamental requisite of due process of law is the opportunity to be heard." Goldberg v. Kelly, 397 U.S. 254, 267 (1970), quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914). The Supreme Court has consistently held that "some kind of hearing" is required before one can be deprived of a property interest. E.g., Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 299 (1981); Parratt v. Taylor, 451 U.S. 527, 540 (1981). The timing and nature of the required hearing "will depend on appropriate accommodation of the competing interests involved." Goss v. Lopez, 419 U.S. 565, 579 (1975). "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, supra at 268-69.

Section 5 of the APA, 5 U.S.C. § 554 (1994), requires an opportunity for interested parties to submit evidence of fact, arguments, and offers of settlement and provides for a "hearing and decision" in accordance with 5 U.S.C. §§ 556, 557 (1994). By its own terms, however, this statute "applies according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1994) (emphasis added). The APA does not apply to all agency proceedings. As the Supreme Court has said:

> We think that the limitation to "hearings required by statute" in § 5 of the Administrative Procedure Act exempts from that section's application * * * those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation * * *. They exempt hearings of less than statutory authority * * *.

Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1949) (emphasis added).

The Board has a duty to consider whether procedures followed by the Department satisfy due process requirements. See Phillips Petroleum Co., 116 IBLA 152, 156 (1990). We have reasoned that constitutional due process does not, in all cases, require a notice and opportunity to be heard prior to the issuance of a proposed decision, but may be satisfied by providing an opportunity to be heard before the initial decision becomes final. Transco Exploration Co. & TXP Operating Co., 110 IBLA 282, 312, 96 I.D. 367, 384 (1989). Our conclusion accords with the Supreme Court's rulings in ICC v. Louisville & Nashville RR, 227 U.S. 88, 91 (1913), that "administrative orders, quasi-judicial in character, are void if a hearing was denied" and in Parratt v. Taylor, supra at 540-41, that

> [A]s many of [our] cases recognize, we have rejected the proposition "that at a meaningful time and in a meaningful manner" always requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticality in some cases of providing any preseizure hearing * * * and the assumption that at some time a full and meaningful hearing will be available.

(Footnote omitted.) 5/

In this case, W&T Offshore has presented its position first to the Director of MMS and now this Board. It has been established for some time that an appeal of an MMS decision to the Board of Land Appeals satisfies due process requirements. See Davis Exploration, 112 IBLA 254, 260 (1989), aff'd, Davis v. Lujan, No. 90-0071 (D.Wyo. April 29, 1991), aff'd, 961 F.2d 219 (10th Cir. 1992); see also Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986).

In its appellate role, the Board of Land Appeals is not limited to merely ascertaining whether agency action is arbitrary or capricious. The plenary authority to undertake a de novo review of the entire record has been delegated to the Board, and it is empowered to make findings of fact regarding those matters within its jurisdiction as fully and finally as might the Secretary, consistent with the provisions of 43 C.F.R. § 4.1 (1998) and 5 U.S.C. § 557(b) (1994). See Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981); United States v. Dunbar Stone Co., 56 IBLA 61, 67-68 (1981), aff'd, Civ. No. 81-1271 PHX EHC (D. Ariz. Feb. 27, 1984), aff'd, Civ. No. 84-1915 (9th Cir. Jan. 24, 1985), cert. denied, 472 U.S. 1028

5/ In Hodel v. Virginia Surface Mining & Reclamation Association, Inc., supra at 304, the Court had the occasion to review whether civil penalties imposed under the Department's administration of the surface mining program, similar in nature to the civil penalties at issue here, comport with due process standards but deemed the challenge premature because there was no showing of harm caused the appellants under those procedures.

(1985). This de novo review authority includes "all the powers which it would have in making the initial decision." 5 U.S.C. § 557 (1994); Briggs v. Bureau of Land Management (BLM), 99 IBLA 137, 141 (1987). The Board is not limited to consideration of only those issues pressed by the parties. Sun Oil Co., 91 IBLA 1, 23, 93 I.D. 95, 107 (1986), aff'd sub nom., Clark Oil Producing v. Hodel, 667 F. Supp. 281 (E.D. La. 1987). Thus, the reviewing powers of the Board of Land Appeals include the authority to make a de novo review of the entire administrative record and to make findings of fact based thereon. See Glanville Farms, Inc. v. BLM, 122 IBLA 77, 85 (1992); United States v. Dunbar Stone Co., supra at 61, 67-68. Accordingly, a party challenging an order issued by MMS is afforded due process protection by being able to have an MMS decision unpholding that order reviewed by this Board.

We further note that the appointment of a Reviewing Officer by MMS and the initiation of a "hearing" to aid such officer in gathering the facts needed to determine whether to assess a civil penalty is not required by statute. MMS, in 30 C.F.R. Part 290 (1996), already provides for IBLA review to fulfill the statutory hearing requirements for assessing civil penalties in 43 U.S.C. § 1350 (1994). The "hearing" before the Reviewing Officer is an interim proceeding which the agency holds "by regulation, rule, custom, or special dispensation" and is not subject to the APA.

There are several distinct challenges posed by W&T Offshore based upon the conduct of the Reviewing Officer and allegations that she violated APA requirements. However, the designation of a non-APA "hearing" officer to render an initial determination was not inconsistent with the APA. The combination of investigative and decision-making functions within an agency as it makes its determinations of whether to take corrective action does not necessarily violate due process. See Withrow v. Larkin, 421 U.S. 35, 51-56 (1975); Gibson v. FTC, 682 F.2d 554, 560 (5th Cir. 1982). Further, Congress has specifically exempted proceedings involving an agency's preliminary determination involving "inspections, tests, or elections" from the APA's procedural requirements. See 5 U.S.C. § 554(a)(3) (1994). This fact-finding proceeding, based upon a lawful inspection, and leading to the assessment of penalties, is not covered by the provisions of the APA.

As a result of our concern about the underlying reason for the W&T Offshore objections and our recognition of the appearance of a conflict of interest rising out of the working relationship between the Reviewing Officer and her immediate supervisor, we deem it appropriate to undertake a de novo review in this case. Thus it is moot whether a Reviewing Officer may "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate" or "be responsible to or subject to the supervision or direction of an employee or agency engaged in the performance of investigative or prosecuting functions for an agency." While these events can create an appearance of impropriety, they are procedural requirements which rest on application of APA to the situation under review. However, the APA was not applicable to the Reviewing Officer's investigation and determination. Moreover, the exercise of the Board's

de novo review authority includes the right to determine any factual or legal question necessary to adjudicate an appeal. We may take cognizance of evidence submitted for the first time on appeal and may consider all relevant information tendered both by an appellant and the investigating and enforcing agency. Our review is governed by the procedures which appellant deems fundamental under due process, i.e., the record is open, subject to proprietary information rules, ex parte communications are restricted, and the Board is not supervised or influenced by the agency involved.

Previously in this Decision we set out a detailed statement of the arguments W&T Offshore presented in its SOR in support of its contention that the equitable doctrine of laches compels dismissal of the notices of violation. W&T Offshore asserts that prejudicial harm has resulted because the delay caused a distinct disadvantage in its being able to adequately present its defense. Although we have some sympathy for W&T Offshore by reason of the difficulties it has experienced as a result of MMS' tardy initiation of its penalty action, we do not believe that the MMS action was so egregious as to invoke the relief W&T Offshore seeks. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by the acquiescence of its officers or their laches, neglect of duty, failure to act, or delays in the performance of their duties. 43 C.F.R. § 1810.3(a); see also Ametex Corp., 121 IBLA 291, 294 (1991); Mallon Oil Co., 107 IBLA 150, 155 (1989). More specifically, the Department's authority to protect the public interest by enforcing its oil and gas lease regulations, which it must do (McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955)), is not vitiated by delays in the performance of its duties. 43 C.F.R. § 1810.3(a). Robert W. Myers, 63 IBLA 100 (1982).

[4] W&T Offshore also presented arguments for dismissal on the basis of equitable estoppel, and we have outlined those arguments in some detail above. Although it is unfortunate that the IG agent incorrectly informed counsel for W&T Offshore that MMS did not intend to take further action, his action does not constitute grounds for invoking estoppel. As we noted in U.S. v. Grooms, 146 IBLA 289 (1998), the Board will look to the elements of estoppel set forth in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), as the initial test in determining estoppel questions. See, e.g., United States v. White, 118 IBLA 266, 303, 98 I.D. 129, 149 (1991). The four elements of estoppel set forth in United States v. Georgia-Pacific Co. are (1) the party to be estopped must know the facts; (2) that party must intend that its conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the former's conduct to its injury. In addition, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982). Estoppel against the Government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 221 (1982); Arpee Jones, 61 IBLA 149 (1982).

Accordingly, we have expressly held that oral statements by a Department of the Interior employee are insufficient to support a claim of estoppel in public land matters, and that the erroneous advice must be in the form of a crucial misstatement in an official decision. Martin Faley, 116 IBLA 398, 402 (1990), and cases cited therein. The oral statements made by the IG agent do not support estoppel in this case.

[5] When assessing a civil penalty under 43 U.S.C. § 1350(b) (1994) and 30 C.F.R. § 250.200(a)(1) (1996), MMS is the "proponent of a rule or order" with the burden of proving its allegations with "reliable, probative, and substantial evidence." BLM v. Ericsson, 88 IBLA 248 (1985); BLM v. Babcock, 32 IBLA 174, 84 I.D. 475 (1977); Frank Halls, 62 I.D. 344 (1955). We have further noted, in Houghland Farms, Inc. v. BLM, 77 IBLA 245, 247 (1983):

> Penalties in civil actions should not be imposed except in cases that are clear and free from doubt. World Insurance of Omaha, Nebraska v. Pipes, 255 F.2d 464 (5th Cir. 1958). In application of penalties, all questions in doubt must be resolved in favor of the party from whom the penalty is sought. Acker v. Commissioner of Internal Revenue, 258 F.2d 568 (6th Cir. 1958), cert. denied, 79 S. Ct. 346, 358 U.S. 940, 3 L.Ed.2d 348, aff'd, 80 S. Ct. 144.

We turn now to an examination of the three orders assessing civil penalties. First we will address the civil penalty assessed for Violation GOM 95-08. It is appropriate to briefly set out the relevant known facts we will use as the basis for assessing civil penalty GOM 95-08, in order to permit an understanding of our reasoning. W&T Offshore was cited for violating 30 C.F.R. §§ 250.121(h)(1) and 250.20(a) (1996) at Well A-21D, South Marsh Island Block 6. The regulation at 30 C.F.R. § 250.121(h)(1) (1996) states, in part, that "[e]ach wireline- or pumpdown-retrievable subsurface safety device may be removed * * * for a period not to exceed 15 days." The violation was based on information in the record indicat[ing] that the SSSD was removed from Well A-21D for a period of 54 days in excess of the 15-day regulatory allowance.

It is undisputed that the wireline ticket for that date indicates removal of the SSSD on October 3, 1990. (Reviewing Officer Decision at 3.) No wireline tickets could be produced for the period between October 23 and December 5, 1990. However, production reports did show a wireline crew was at the platform from October 21 through November 4, 1990, but those reports did not indicate the nature of the work undertaken. Id. It is also undisputed that on December 11, 1990, when the MMS inspector directed the W&T Offshore employee to pull the SSSD from the well, the SSSD was in the well. It is also an undisputed fact that neither MMS nor W&T Offshore produced a wireline ticket dated between October 3 and December 11 indicating when the SSSD was reinstalled.

An objection voiced by W&T Offshore was that so much time had passed that testimony was limited to routine practice because of the understandable inability to remember the details of what had happened 5 years previously. In addition it alleges that, because of the passage of time beyond the 2-year record retention requirement found at 30 C.F.R. § 250.124(b) (1996), its successor-in-interest, who held records important to its defense, had lost or destroyed those records. The Reviewing Officer relied upon the testimony of a wireline operator who testified that he had been at the well on the afternoon of the 10th of December, but could not remember what he did, and upon W&T Offshore's inability to produce any documents showing that the SSSD had been placed in the well earlier as the basis for her conclusion that an unidentified third party wireline operator had placed the SSSD in the well some time between 9 p.m. on the 10th and when the SSSD was removed the next day. This assumption was deemed to outweigh any assumption that either someone had failed to note placing the SSSD in the hole on an earlier wireline ticket or that a ticket indicating that it was subsequently placed in the hole was thrown out or lost.

In this case, the period that the SSSD was out of the well is determinative both as to the violation and the amount of the penalty assessed for the violation. Therefore, we do not deem it important to determine which assumption carries more weight. Rather, we find it inappropriate to assess a civil penalty for violation of this regulation based upon an assumption regarding when the violation took place. It was just as logical to assume that someone failed to make a notation on a wireline report or to assume that certain of the wireline reports had been discarded because the regulatory period for keeping those reports had run as it was to assume that an unknown wireline operator had placed the SSSD in the well and the report of that work was lost.

We find that MMS has failed to sufficiently substantiate its allegation that W&T Offshore violated the provisions of 30 C.F.R. § 250.121(h)(1) (1996) with reliable, probative, and substantial evidence that the SSSD was absent from that well for a period in excess of 15 days between October 3 and December 11, 1990. The evidence it relied upon was not clear and free from doubt. The Associate Director's decision dismissing the appeal of Penalty Assessment GOM 95-08 is reversed, and the penalty assessment GOM 95-08 is hereby vacated.

We turn now to the two civil penalties assessed for the Violations identified as GOM 95-06 and GOM 95-07. Our determination regarding these penalty assessments is largely based upon the interpretation of the statute MMS applied when levying the civil penalties against W&T Offshore for violation of MMS regulations designed to assure that operations are conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstructions to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health. As can be observed by examining 43 U.S.C. § 1350(b) (1994),

there are two categories of statutes and regulations which may trigger the imposition of a civil penalty. The first group consists of actions which are not likely to pose an immediate threat of serious, irreparable, or immediate harm. 6/ When an operator violates one of these regulations, 43 U.S.C. § 1350(b)(1) (1994) affords the operator a reasonable amount of time to take the steps necessary to once again be in compliance. Typically regulations requiring reporting and signing fall into this category. The second consists of those statutes and regulations adopted to address actions an operator must take (or refrain from taking) to avoid situations which may cause damage to the environment or to property, or endanger life or health. By reason of the fact that the violation of the second type of statutes or regulations could result in immediate damage to the environment or to property, or endanger life or health, the provisions of 43 U.S.C. § 1350(b)(2) (1994) operate immediately, and the operator is not afforded a period of time to correct the violation before becoming liable for a civil penalty.

The regulation applicable to the civil penalty assessments in Violations GOM 95-06 and GOM 95-07 is found at 30 C.F.R. § 250.121(h)(3) (1996). This regulation, which governs monitoring of wells during temporary removal of SSSD's for routine operations, states, in pertinent part: "A platform well shall be monitored, but a person need not remain in the well-bay area continuously if the master valve is closed. If the well is on a satellite structure, it must be attended or a pump-through plug installed * * *." The wells named in GOM 95-06 and GOM 95-07 are all satellite structures and unmanned facilities. Information in the record indicates that (1) the SSSD's were removed from the wells and (2) the wells were left unattended after the SSSD's were removed for a total violation period of 30 days in GOM-95-06, and for a total period of 68 days in GOM 95-07.

For a civil penalty to be appropriate under 43 U.S.C. § 1350(b)(2) (1994) and 30 C.F.R. § 250.200(a)(1) (1996), a violation must occur, and the violation must increase the risk of harm to the environment, human life, or property. It is not necessary that the violation harm the environment, human life, or property, it need only increase the risk of harm. We emphasize that the statement describing the harm that could result from failure to install an SSSD, set out in the Associate Director's decision, illustrates, generally, the risk of harm that could result from failing to install an SSSD, but has not been accepted by us as illustrating the degree of harm posed by the failure to install SSSD's in the wells in question. The Associate Director decision noted that should anything have happened to the wellhead, there would have been no downhill safety device to prevent well flow, a situation which could result in a pollution event or a fire hazard. The risk of harm resulting from the failure to install an SSSD is sufficient to dictate a finding that violation of 30 C.F.R. § 250.121(h)(3) (1996) exposes the operator to penalties levied pursuant to 43 U.S.C. § 1350(b)(2) (1994).

6/ We note that these MMS regulations are similar to the onshore regulations administered by BLM, and the requirements for imposition of penalties by the two agencies are comparable.

Civil penalty assessments GOM 95-06 and GOM 95-07 were issued for failure to comply with the regulatory requirement to install and maintain tubing plugs or SSSD's in wells open to hydrocarbon-bearing zones capable of natural flow. A critical factor to our determination in this case is that all of the wells subject to these two assessments had produced hydrocarbon under pressure prior to the incidents giving rise to the civil penalty assessment now at issue. The incidents arose shortly after W&T Offshore acquired the leases, and happened during W&T Offshore's reworking operations, which were undertaken in an attempt to return the wells to production. That is, the work was undertaken with the hope of restoring the natural flow of the hydrocarbon from the hydrocarbon bearing zones the wells had penetrated and from which production had previously come.

W&T Offshore has never denied that the wells were open to geologic formations that had produced hydrocarbons in the past or that they had been demonstrated to be capable of natural flow. It argues that as a result of its unsuccessful efforts the wells were deemed to no longer contain hydrocarbons and that they were no longer capable of natural flow. While these arguments do go to the severity of the violation, they do not overcome the fact that at the time of the violations the wells were open to zones that had been proven to be hydrocarbon-bearing, that those zones had been found capable of natural flow, and that there is no evidence that MMS had granted formal permission for permanent removal of the SSSD's.

W&T Offshore asserts that, since it subsequently determined that these wells were in nonhydrocarbon-bearing zones incapable of natural flow, there can be no violation. The language at 30 C.F.R. § 250.121(a) (1996) provides that when an operator makes this finding, upon application and justification, MMS may determine that the well is incapable of natural flow. When this determination is made MMS will grant approval for permanent removal of the SSSD from the well. Nothing in the record would indicate that this approval had been granted, and we do not believe a document granting approval to remove an SSSD is a document that would be routinely discarded after a 2-year period.

W&T Offshore also contends that SSSD's were not required for the wells operating under Sundry Orders, issued pursuant to 30 C.F.R. § 250.103 (1996) for nonroutine well-workover operations. On this point we will accept the MMS assertion that the operations being conducted during the period in question were routine, and therefore not subject to the Sundry Orders. If we were to find otherwise, the end result would be all but identical, because workover operations are defined as work performed to maintain or restore production. If the work is in the nature of well workover, an SSSD must be in place whenever the facility is not manned, and if the work is routine nonworkover work, an SSSD must be in place if the facility is not manned. See 30 C.F.R. § 250.107(e) (1996). In either case an SSSD must be in place if a crew is not on the structure.

W&T Offshore strongly urges that the Board find that there was no violation because subsequent testing established that there was no threat

of serious, irreparable, or immediate harm because either the hydrocarbons had been removed and the formation had been "watered out, or the wells were no longer capable of natural flow." However, as noted above, in such cases an SSSD is still required unless and until MMS has granted formal approval for permanent removal of the SSSD from the well. While the information regarding the wells subsequently being found to be watered out and incapable of positive flow has a material bearing when considering the degree of risk when calculating the penalty amount, it does not rule out the need to have an SSSD in the well when the platform is unmanned, unless and until MMS has granted formal permission for permanent removal. The findings that a violation of 30 C.F.R. § 250.121(h)(3) (1996) took place at the wells described in civil penalty notices GOM 95-06 and GOM 95-07 are affirmed.

One of the five major errors alleged in the SOR was the Reviewing Officer and Associate Director conclusion that W&T Offshore's compliance history was not good. This argument was mooted when we deemed it appropriate to conduct a de novo review. As will be seen below, W&T Offshore's statements regarding its compliance history are being given due consideration when we address the amount of the civil penalty properly assessed for GOM 95-06 and 95-07.

We now turn to the amount of the penalty to be assessed for the two remaining violations. For Violation GOM 95-06, the Reviewing Officer found:

> In consideration of all circumstances of the violations a penalty of $41,400 [sic $41,100] is hereby assessed against W&T [Offshore]. This penalty amount is based on $1,500 per day per well with the following violation periods:
>
> Well B-13D August 18 - 21, 1990 (4 days)
> Well 26 January 1 - 6, 1991 (6 days)
> Well B-6 October 27, 1990 - November 2, 1990 (7 days)
>
> Well 29 was assessed $1,200 per day with the violation period of October 11 - 23, 1990 (13 days). The proposed penalty for this well was mitigated due to there being less of a threat of this well flowing had the wellhead equipment been damaged. No tubing pressure was recorded for the violation period and the Sundry Notice stated there was wireline fish in the hole.

(Feb. 14, 1996, Reviewing Officer's Decision re GOM 95-06 at 4.)

For Violation GOM 95-07, the Reviewing Officer found:

> Based on a complete review of the evidence * * *, I find that W&T [Offshore] did violate 30 C.F.R. § 250.121(h)(3) for well No. 34, South Marsh Island Block 11. In consideration of all circumstances of the violation a

> penalty of $81,600 is hereby assessed against W&T [Offshore]. This penalty amount is based on $1,200 per day with the violation period being August 20 through October 26, 1990.

(Feb. 9, 1996, Reviewing Officer's Decision at 4.) No further explanation was given for how she arrived at the penalty amount.

[6] When deciding the dollar amount of a civil penalty, the Reviewing Officer must consider the factors that contribute to a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment. Good judgment and detailed documentation are required, and an explanation of the factors used as the basis for determining that amount and the weight given to those factors should be stated.

We note that when the violations took place 43 U.S.C. § 1350(b) (1994) had just been enacted, 30 C.F.R. § 250.200(a)(1) (1996) had not been adopted, and the MMS Civil/Criminal Penalty Program Guidebook (Guidebook) had yet to be written. All three were in existence when the Reviewing Officer examined the violations. When determining the penalty amount we will use all of these tools.

The Act and the regulation have been quoted above and we will not repeat them here. The Guidebook states:

> When deciding on a penalty amount, the Reviewing Officer should consider that the amount of the civil penalty can accumulate * * * from the day the violation occurred if the violation constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life * * *, property, any mineral deposit, or the marine, coastal, or human environment. In selecting the dollar amount, the Reviewing Officer may consider any reasonable factor. The following are some initial factors to consider:
>
> - Whether persons were injured or killed because of the violation;
> - The extent to which the environment was harmed because of the violation;
> - The extent to which persons or the environment were exposed to increased risk to harm because of the violation;
> - The extent to which the party's carelessness led to the violation;
> - Whether the violator has committed similar violations;
> - Whether the violator cooperated with the investigation;
> - The violator's general record of compliance with OCS requirements; and
> - The extent to which any mineral deposit was harmed because of the violation.

(Handbook at 17.) Appendix B to the handbook, a generalized matrix for civil penalty assessments, states in pertinent part:

> This table is provided to assist the Reviewing Officer in making a determination on a proposed civil penalty amount. * * * the recommended amounts are per day amounts. The table consists of five ranges related to the three enforcement actions used in MMS. (W=Warning, C=Component Shut-in, and S=Facility Shut-in.) These enforcement categories are general and do not always relate to the nature or severity of the violation, they are a starting point to make a preliminary determination. Many factors are involved in this type of decision, all of which must be documented either by the recommending official or the Reviewing Officer, in the case file.

(Appendix B to Handbook at 1.) The severity of the violations are then discussed seriatim, with Category 1 representing the least severe and Category 5 the most severe. Applicable comments will be addressed during the course of our discussion of the basis for our determination of the penalty amounts below. The discussion continues with the following instruction:

> Please keep in mind that these elements are not mutually exclusive. Various elements within each category may occur together. * * * good judgment and detailed documentation are required in making a final determination on the penalty amount. It is expected, and normal, that some cases will have very strong aggravating or mitigating circumstances, and that in such cases penalties will be recommended at levels higher or lower than those in the matrix. In such cases, an explanation should be included with the recommendation.

(Appendix B to Handbook at 2.) The enforcement action used by MMS for failure to install an SSSD is Component shut-in. See generally 30 C.F.R. § 250.10 (1996). For this enforcement action the Generalized Matrix listed the following amounts:

Severity of Violation and/or Impacts (Categories)	Amount (in Dollars)
1	200 — 500
2	500 — 800
3	800 — 1,500
4	1,500 — 3,000
5	3,000 — 10,000

Beginning with the listed factors for consideration, we note that no persons were injured or killed because of the violations. The environment was not harmed because of the violations. However, there was a definite

exposure to an increased risk of harm to persons and the environment. W&T Offshore alleges that the Reviewing Officer did not take into consideration the amount that it had cooperated with MMS during the course of the investigation. We note that during the initial stages of the investigation, MMS was seriously considering seeking a criminal penalty against certain of W&T Offshore's employees. At the same time W&T Offshore was voluntarily assembling and delivering documents to MMS that were potentially incriminating. We deem the degree of cooperation significant. W&T Offshore points to the MMS "Safety Award for Excellence" for its operations during the period January 1 through June 30, 1989, for "promoting the practice of operational safety, environmental protection, and compliance with the operating regulations" as indicative of its general record of compliance with OCS requirements. In response, MMS states that the Reviewing Officer had substantial evidence upon which to base her conclusions, and acted appropriately. No deposit was harmed because of the violation.

In summary, five of the eight factors are either of no consequence or weighed in favor of W&T Offshore. The three remaining factors weigh against W&T Offshore. They are the exposure of risk, the extent to which W&T Offshore's carelessness led to the violation, and whether it had committed similar violations.

W&T Offshore has advanced two reasons it believed that the regulation was inapplicable. For those wells operating under a Sundry Notice, the regulation stated that the regulation requiring an SSSD did not apply. However, the regulation dealing with Sundry Notices called for an SSSD when the well was not attended. Second, it notes that the wells were no longer capable of natural flow. However, the regulation clearly provides that the SSSD is to remain in place at a well no longer capable of natural flow until MMS authorizes its permanent removal.

Although it can now be said that persons and the environment were exposed to little risk as a result of the failure to install the SSSD's, we are unable to say that this exposure was nil before the measurements demonstrating that the efforts exerted by W&T Offshore were fruitless had been made and, that in spite of its efforts, a positive flow could not be restored. Therefore, we are unwilling to say that, at the time of the violation, this risk was not present. On the other hand, it would not be realistic to now say that the risk was extreme.

There is no question that W&T Offshore had committed similar violations as the record indicates that INC's had been issued for similar violations previously. However, there is no evidence that civil penalty action was taken, either because the violations were abated within the time allowed prior to passage of 43 U.S.C. § 1350(b)(2) (1994), or because the statute of limitations was allowed to run.

With these factors in mind, we will examine the analysis of the severity of violations as set out in Appendix B to the Handbook. First, we noted above that the fact that none of the wells was deemed capable

of natural flow had no bearing on the issue of whether a violation had occurred because MMS had not given permission for permanent removal. However, this fact has a direct bearing on the severity of the violations. If the wells were incapable of natural flow, the degree of risk is greatly reduced. Thus, under our evaluation for severity, the violation caused no injury to humans or loss of human life (Category 1). There was no harm or damage to the marine or coastal environment, including mammals, fish, or other aquatic life (Category 1). Similarly, there was no damage to mineral deposits (Category 1). All evidence indicates cooperation with the investigating officials, even in the face of possible criminal penalties (Category 1). There was a definite increased exposure to increased risk of harm to persons and the environment when the violation took place. We will rate this exposure as Category 3. Considering the fact that until very shortly before the time of the violations the regulations required notice and time to correct and the possible loss of records, we will rule that the degree of carelessness was minimal (Category 1). As noted previously, there were repeated offenses for the same violation (Category 4), and while, without the evidence submitted by W&T Offshore, the record of compliance would appear to be Category 5 (poor record of compliance), the evidence submitted showing that W&T Offshore was receiving awards for its safety and compliance during the same period is sufficient to cause us to mitigate the severity to "average record of compliance" (Category 3).

In summary, of the eight listed factors to be considered, three are applicable to the violations, and of the five elements of severity, three were Category 1, two were Category 3, and one was Category 4. Our analysis leads to the conclusion that W&T Offshore had, on two identified occasions (and probably more), conducted its operations in a manner that was in violation of an MMS regulation adopted to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstructions to other users of the waters or subsoil and seabed, or other occurrences which may have caused damage to the environment or to property, or endangered life or health. However, further investigation disclosed that its violation of that regulation actually posed very little risk of harm to the environment, human life, or property. It must be kept in mind, however, that it is not necessary that the violation cause actual harm to the environment, human life, or property. It need only pose a risk of harm. Weighing the factors we arrive at the following finding:

For Violation GOM 95-06, a penalty of $15,000 is hereby assessed against W&T Offshore. This penalty amount is based on $500 per day per well for the following violation periods:

Well B-13D August 18 - 21, 1990 (4 days)
Well 26 January 1 - 6, 1991 (6 days)
Well B-6 October 27, 1990 - November 2, 1990 (7 days)
Well 29 October 11 - 23, 1990 (13 days).

For Violation GOM 95-07, a penalty of $34,000 is hereby assessed against W&T Offshore. This penalty amount is based on $500 per day for the 68-day violation period August 20 through October 26, 1990.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and our de novo review authority, the Associate Director Decision is hereby vacated, the Reviewing Officer's Final Decision in Civil Penalty Case GOM 95-06 is affirmed as modified by this decision; the Reviewing Officer's Final Decision in Civil Penalty Case GOM 95-07 is affirmed as modified by this decision; and the Reviewing Officer's Final Decision in Civil Penalty Case GOM 95-08 is reversed.

_____
R.W. Mullen
Administrative Judge

I concur:

_____
Will A. Irwin
Administrative Judge